

# **The London School of Economics and Political Science**

## *Beyond Illusion: A juridical genealogy of consent in criminal and medical law*

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## **DECLARATION**

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others.

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## ABSTRACT

Consent is a concept used frequently and with great significance in a wide array of legal fields. It serves to regulate relationships, legitimize authority, delimit normality, and entrench idealized ways of being in the world. Yet despite the consequence of these functions, there is very little precision within legal scholarship about just what consent *is*. Few investigations of its definitional content depart from presumptive statements about personal autonomy. These associations are often described as the ‘common sense’ of consent and serve to secure a foundationalist discourse about what consent is, rendering alternative conceptions of its meaning or functions unintelligible. This is perhaps best evidenced in more critical approaches to consent, where despite widespread acknowledgement of the concept as a legal and political fiction, its status as a signifier of autonomy is maintained. This creates an imperative to move beyond the notion of consent as merely an illusion, to an understanding of it as something more operative. Not only does the story of autonomy that is told about consent obscure the social realities of inequality, difference, and subordination that might threaten a notion of a homogenous citizenry (and thus, governmental action made in its name), but it also conceals the historically specific conditions of existence which have brought consent’s ‘common sense’ story of autonomy into being. This thesis explores how this dominant narrative of consent, while producing certain ‘ideal’ subjectivities, also necessarily produces subjectivities which don’t fall within the ambit of consent. Moreover, this project asks what is achieved when the meaning of consent is positioned as a matter of ‘common sense’? What does its apparent transparency keep obscure?

In contrast to conventional approaches to consent, this project positions consent as an historical artefact rather than a concept with doctrinal, cognitive, or communicative certainty and seeks to investigate its operations across legal fields rather than strictly within them. This includes an examination of consent to sex, the doctrine of informed consent in medical jurisprudence, and the defence of consent to assault in professional sporting contexts. Further, the project engages in a ‘juridical genealogy’ of consent, studying its use in three vastly different historical periods in search of how it might perform different socio-political functions than understandings of its role within contemporary medical and criminal law suggest it should. How these counter-narratives of consent serve to challenge the dominant autonomy story are investigated for what they reveal about the frames of cultural and legal intelligibility at work in consent law today.

*This one's for JR.*

JOE: I was looking for you. Where were you?

MAG: Waiting for you.

- Brian Friel, *Lovers* (1967)

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I have had a practice over the course of writing this thesis of looking up the completed doctoral dissertations of people that I know. Somehow it helped to convince me that the task I had set out in front of me was possible to complete. Aside from feeling a bit comforted, I was struck by how all of them were built on the backs and hearts and minds of so many others. This could not be more accurate in my case, and while it is a rather feeble tribute to those who have helped me, I hope these small words of thanks will help to dispel the ‘illusion’ that this accomplishment has been a solitary endeavour.

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Greet me with banners and balloons  
And my hard drive smashed to pieces  
Nothing left for me to save  
When I write my [doctoral] thesis.

- John K. Sampson (2012)

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## INTRODUCTION

We tend to invoke ‘consent’ to talk about personal subjects that matter a great deal to us. And we are able to do so because consent is a protean concept that takes diverse and shifting shapes depending upon the context. Yet because we are often only dimly aware of the shifting content of consent, we end up talking past one another – and, even worse, contradicting one another – without being aware of it.<sup>1</sup>

Everyone, it seems, is talking about consent. International campaigns for the prevention of sexual assault proclaim that ‘consent is sexy,’ charting a course away from the rhetoric of ‘just say no.’<sup>2</sup> Sports leagues, under fire for failing to adequately protect players from in-game violence, rely on judicial determinations of a player’s right to consent to injury.<sup>3</sup> News sources around the globe recently debated the limits of physicians’ standards of care when Canada’s highest court declared that consent is required for the withdrawal of treatment,<sup>4</sup> while leading legal scholars have claimed the past century as an ‘era of consent.’<sup>5</sup> Yet as the opening excerpt from Peter Westen’s work suggests, legal scholarship often makes a claim of uncertainty about just what consent is and about what, exactly, it is meant to do. This ‘shifting content’ is rather astounding given the consequential place consent holds in law, both in terms of the functions it is thought to perform and the wide array of legal sub-fields within which it operates. Consent is used to assess when property has been equitably traded, bodily contact lawfully made, and levels of personal integrity and cognitive awareness adequately reached. It is seen as a central factor in the regulation of relationships, the

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<sup>1</sup> Peter Westen, *The Logic of Consent* (Ashgate, Aldershot 2004), vii.

<sup>2</sup> See, for instance, the international campaign website at: <[www.consentissexy.net/](http://www.consentissexy.net/)> Last accessed: 16 December 2013.

<sup>3</sup> See, for example: *R. v. Barnes* [2005] 1 Cr App Rep 507; and case commentary by M. James, ‘Player Violence and Compensation for Injury: *R. v. Barnes* [2005] Cr. App. Rep. 507’ in J. Anderson (ed) *Leading Cases in Sports Law* (Asser Press 2013) and S. Weimer, ‘Consent and Right Action in Sport’ (2012) 39(1) *Journal of the Philosophy of Sport* 11.

<sup>4</sup> *Cuthbertson v. Rasouli*, 2013 SCC 53.

<sup>5</sup> See: J. Oliffe, et. al. “‘Truth Telling’ and Cultural Assumptions in an Era of Informed Consent’ (2007) 30(1) *Family & Community Health* 5; and S. Wolf, ‘Toward a Systematic Theory of Informed Consent in Managed Care’ (1999) 35 *Houston Law Review* 1631.

establishment of political communities, and the constitution of subjectivity. For political theorists, it is the very foundation for legitimate state authority. Consent is described in law as a doctrine, device, defence, excuse, justification, process, signifier, and even a form of ‘moral magic’<sup>6</sup> and it is employed in as vast an array of applications as the diversity of law allows, including contract, tort, criminal, medical, family, property, constitutional and administrative law, among others.

Amidst such breadth of scope and significance, it is troubling that consent’s content and scope is not defined with more specificity; yet, this is hardly a new problem. Knowing the ‘inner will’ of another (and evaluating its authenticity) has long been a matter of contemplation among philosophers and legal theorists alike.<sup>7</sup> Further, law has recognized the impossibility of knowing a person’s ‘true’ inner intentions while simultaneously acknowledging the necessity for a means of approximating this ideal.<sup>8</sup> Legal scholarship contains many instances where the law’s failures in this approximation project have been recognized, along with the harms that ensue.<sup>9</sup> Despite an awareness of these failures and a difficulty in establishing the exact content or scope of consent, the law has imbued consent with a certain truth, a ‘common sense’ about what it means, signifies, and does. In this way, consent operates with what H.L.A. Hart described as an ‘open texture,’ similar to how one might be familiar enough with the roads and routes through a town so as to have put them to memory ‘without being able

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<sup>6</sup> H. Hurd, ‘The moral magic of consent’ (1992) 2(2) *Legal Theory* 121.

<sup>7</sup> St. Thomas Aquinas’ own struggles with this challenge (and his reflections on Aristotle’s views on knowledge of the ‘inner will’) are explored in further detail in Chapter Three.

<sup>8</sup> The use of the reasonable person standard is an example of an explicit avoidance of the dilemma, but more nuanced instances of law’s struggles with needing to know the inner will of another can be observed in a variety of legal areas. The inference of the requisite *mens rea* from the circumstances of an offence in the criminal law of attempts is one example.

<sup>9</sup> Some of these instances are explored in greater detail in Chapter One.

to draw a map' of them.<sup>10</sup> This results in consent being treated somewhat paradoxically in law, where it is deemed to have a 'shifting content' while simultaneously treated as having a straightforward meaning – one rooted in personal autonomy. The ensuing discussion seeks to interrogate this claim of clarity. What is achieved when the meaning of consent is positioned as a matter of 'common sense'? What does its apparent transparency keep obscure?<sup>11</sup> The present work takes up these questions, interrogating the tacit operations of power, discipline, and normativity that are effected by the use of consent in law.

### Specifying the inquiry

The current project concerns itself with the concept of 'consent'<sup>12</sup> as it is used and theorized in law. This topic is conventionally approached in one of three ways. The first might be described as a standardization project where a description of consent's internal 'logic' or a set of guiding principles about its operation in a given field is sought so as to determine when consent is 'found' and what circumstances might serve to vitiate it.<sup>13</sup> These analyses are often normatively driven, with aims of critiquing and reforming how consent operates in theory<sup>14</sup> or legal and clinical practice.<sup>15</sup> Secondly, investigations of

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<sup>10</sup> H.L.A. Hart, 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' (1957) 105 *Univ. of Penn. L.R.* 953, 956-957. Hart is not referring explicitly to consent in this piece but rather to a variety of legal concepts which he felt were approached with a certain ambiguity – something he suggests is a consequence of analytical jurisprudence itself.

<sup>11</sup> These questions are versions of those asked by Judith Butler in her 1999 Preface to *Gender Trouble* (10<sup>th</sup> anniversary edition), where she suggests '[t]he demand for lucidity forgets the ruses that motor the ostensibly 'clear' view... What travels under the sign of 'clarity'?... Who devises the protocols of 'clarity' and whose interests do they serve?'; J. Butler, *Gender Trouble* (10<sup>th</sup> ann edn, Routledge 1999), xix.

<sup>12</sup> For the purpose of avoiding an overly clumsy text, I hereafter avoid the use of shudder quotes around the term consent; however, the term should be considered to be in a consistent state of contestation throughout the ensuing discussion.

<sup>13</sup> See: Westen (n 1); and M. Cowling and P. Reynolds (eds), *Making Sense of Sexual Consent* (Ashgate 2004).

<sup>14</sup> R. Hunter and S. Cowan, (eds) *Choice and Consent: Feminist Engagements with law and subjectivity* (Routledge-Cavendish, New York 2004); D. Herzog, *Happy Slaves: A Critique of Consent Theory* (The University of Chicago Press 1989).

consent can take the form of a comparative analysis, where general surveys are conducted of how consent is defined or can be seen to function across diverse areas of its application, often with the similar aim of providing alternatives to these operations.<sup>16</sup> The third approach is the theoretical reconstruction of consent, involving historical accounts,<sup>17</sup> philosophical ontologies,<sup>18</sup> or what some have simply termed ‘jurisprudential analysis.’<sup>19</sup>

This project shares some components with each of these three approaches, including the examination of consent as it is used in more than one sub-field of law and the exploration of alternative theoretical accounts of the concept’s operations and effects within these fields. Yet, as a whole, this project does not belong to any of these investigatory camps given its refusal to treat consent as a self-evident, pre-existent, and pre-juridical aspect of socio-political life or human psychology. This thesis is instead interested in exploring consent as a product of human relations that in particular historical contexts comes to house pervasive, truth-telling meanings about human activity and personhood. It seeks to position consent as an historical artefact rather than a concept with doctrinal, cognitive, or communicative certainty and thus moves away from traditional legal inquiries into what is *said* about consent towards an examination of what consent can be seen to *do*. More specifically, I want to show how the concept

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<sup>15</sup> R. West, ‘Legitimizing the Illegitimate: A Comment on *Beyond Rape*’ (1992) 93(6) Colum. L. Rev. 1442; P. Schuck, ‘Rethinking Informed Consent’ (1994) 103 *Yale Law Journal* 899; T. Beauchamp and J.F. Childress, *Principles of Bioethics*, (6<sup>th</sup> ed, OUP 2008).

<sup>16</sup> K. van Marle, ‘The politics of consent, friendship, and sovereignty’ in Hunter and Cowan (n14); G. Calder, ‘The language of refusal: Sexual consent and the limits of post-structuralism’ in Cowling and Reynolds (n 13).

<sup>17</sup> P. Haag, *Consent: Sexual Rights and the Transformation of American Liberalism*. (Cornell University Press, Ithaca, NY, 1999).

<sup>18</sup> B. Kious, *The Evidentiary Account of Consent’s Moral Significance*. (PhD Dissertation, University of California 2009).

<sup>19</sup> S. Cowan, ‘“Freedom and Capacity to Make a Choice”: A feminist analysis of consent in the criminal law of rape’ in V. Munro and C. Stychin (ed) *Sexuality and the Law: Feminist Engagements* (Routledge, NY 2007).

functions to establish norms of intelligibility that bring particular subjectivities into existence while leaving others outside this frame of recognisability.<sup>20</sup>

Admittedly, it is unusual for an examination of the law's treatment of consent to begin from the premise of telling a story about otherness. Most histories of difference focus on categories of persons or identities which position certain groups in either marginal or external positions to a 'presumed (and usually unstated) norm.'<sup>21</sup> This thesis, however, enters the scene of consent theorising with three atypical contentions. *First*, that a series of unspoken presumptions about what is 'normal' human behaviour, cognitive capacity, communication strategy, and even the core components of recognisable personhood operate within contemporary treatments of consent in all areas of its legal application.<sup>22</sup> These articulations of consent and its pre-requisites in both moral philosophy and law reflect a foundation in a certain understanding of reason, particularly in terms of which persons or mental states can be excluded from consenting capacity, namely children, the mentally 'impaired,' or the 'coerced.' Where the desires, behaviours, or subjectivities of those seeking consent venture too far off the beaten path, the capacity to consent is denied. Thus the few legislative definitions of consent that exist prioritise certain determinations of capacity that are in alignment with the 'common sense' of consent, i.e. informed, voluntary, and rational action. The United Kingdom's recently amended

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<sup>20</sup> Here I employ the somewhat awkward term of 'recognisability' in lieu of 'recognition' to invoke Judith Butler's use of the term as a form of state-sanctioned or enacted intelligibility. I also employ it to engage in what Butler has suggested is an obligation on scholars in the humanities to 'question common sense, interrogate its tacit presumptions and provoke new ways of looking at a familiar world.' I am persuaded by her suggestion that '[l]anguage that takes up this challenge can help point the way to a more socially just world.' Thus, I employ the use of these types of linguistic 'stumbling blocks' to momentarily halt the reader, invoking opportunities for reflection and a re-thinking of the 'common sense'; J. Butler, 'A "Bad Writer" Bites Back' *New York Times* (Op-Ed) 20 March 1999, A29.

<sup>21</sup> J. Scott, 'The Evidence of Experience' (1991) 17 *Critical Inquiry* 773.

<sup>22</sup> This includes medical law's doctrine of informed consent, the defence of consent found in criminal and tort law analyses of assault, and the valuation of equitable exchange that consent is thought to signify in contract law.

*Sexual Offences Act*,<sup>23</sup> for instance, defines consent as a matter of agreement by ‘choice’ where one ‘has the freedom and capacity to make that choice.’<sup>24</sup> *Black’s Law Dictionary* defines consent as an ‘agreement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person.’<sup>25</sup> And in their well-regarded delineation of the four basic principles of bioethics, Beauchamp and Childress identify ‘autonomy’ as foremost, linking it with the Greek etymology of ‘self rule,’ and manifested as voluntary choice(s) made by a competent, informed, and rational individual.<sup>26</sup> Even where the courts have ruled against the defence on the basis of public policy concerns,<sup>27</sup> the availability of consent has hinged on the ‘reasonableness’ of the defendant’s conduct, where the would-be consenter’s rationality can be vitiated by the ‘unwritten rules of the game’<sup>28</sup> or the unintelligibility of her conduct (e.g. self-harm or sadomasochistic activities).

*Second*, these unstated norms are both concealed and produced by the paradoxical character of consent as a concept (or doctrine or defence, etc.) which is difficult to define yet integral to determining the limits of human action in almost every sub-field of law. As Emily Sherwin has argued: ‘[i]t is in the nature of law that law can and must determine whether consent has occurred, even if no one is sure just what consent is.’<sup>29</sup> This problem of definitional elusiveness is compounded by a focus within consent

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<sup>23</sup> *Sexual Offences Act* 2003 (c. 42), United Kingdom.

<sup>24</sup> *SOA* (n 23), s. 74.

<sup>25</sup> B.A. Garner (ed) *Black’s Law Dictionary*, 7<sup>th</sup> ed. (West Group 1999), 300.

<sup>26</sup> T. Beauchamp and J. Childress, *Principles of Biomedical Ethics*, 5<sup>th</sup> ed. (OUP 2001), 67.

<sup>27</sup> See the English case, *R. v. Brown* (1993) 2 All. E.R. 75 where the House of Lords did not permit the defence of consent in a case involving sadomasochism given the lack of ‘good reason’ for the injuries caused. Similar arguments have been accepted in the arena of sporting activities, see the Canadian cases: *Cey*, (1989) 48 C.C.C. 3d 480 (Sask. C.A.), *Cicarelli* (1989) 54 C.C.C. 3d 121 (Ont. Dist. Ct.), *Leclerc* (1991) 67 C.C.C. 3d. 563 (Ont. C.A.) and the English case, *R. v. Barnes* (n 3). These ‘public policy’ arguments are subject to a longer discussion in the following chapters, specifically Chapters One, Four, and Five.

<sup>28</sup> See: *Cey*, (n 27); *Cicarelli* (n 27); *Leclerc* (n 27); and *McSorley* [2000] BCPC 117 (CanLII) (all cases arising from assaults within the context of an ice hockey game.)

<sup>29</sup> E. Sherwin, ‘Infelicitious Sex’ (1996) 2 *Legal Theory* 209, 229.

jurisprudence on what consent is *not* (e.g. coercion), rather than what it *is*.<sup>30</sup> This is well evidenced by the backgrounders to the consent provisions in the *Sexual Offences Act*, including the Home Office Report, *Setting the Boundaries*<sup>31</sup> and the White Paper, *Protecting the Public*,<sup>32</sup> which established the government's 'blueprint for legislation.'<sup>33</sup> Despite a declaration that the aim of the statutory revisions was to make consent 'clear and unambiguous,' the legislative approach taken was to delineate a set of (rebuttable) circumstances in which 'non-consent' would be presumed, while maintaining the defence's right to argue that consent still existed.<sup>34</sup> Further, much of the scholarship that does address the content of consent (rather than its negative) – in fields as diverse as neurobiology and philosophy – has concerned itself with the circumstantial aspects of consent (e.g. how is it conveyed) rather than its meaning.<sup>35</sup> The content of consent is left to presumptions about its heralded foundation in personal autonomy and free action.<sup>36</sup>

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<sup>30</sup> For example, Pamela Haag suggests two means by which sexual consent is defined and interpreted. First, through an enumeration of the 'parameters, physical conditions, and events' of what constitutes violence; and second, with an emphasis on the self-evident utterances of 'yes' or 'no' (n 17), xv. Paul Reynolds makes a marked departure from this approach in his chapter, 'The Quality of Consent' in Cowling and Reynolds (n 13).

<sup>31</sup> Home Office, *Setting the Boundaries: Reforming the law on sex offences*. (Home Office, London, July 2000).

<sup>32</sup> Home Office, *Protecting the Public: Strengthening protection against sex offenders and reforming the law on sexual offences*. (White Paper, Cm. 5668, 2002).

<sup>33</sup> J. Temkin and A. Ashworth, 'The *Sexual Offences Act 2003*: (1) Rape, Sexual Assaults, and the Problems of Consent' (2004) *Criminal Law Review* 328, 333.

<sup>34</sup> As Temkin and Ashworth note, this approach required 'that, once the prosecution had established beyond reasonable doubt that one of the listed circumstances existed, the burden of proof would then lie on the defence to prove consent on the balance of probabilities,' (n 33), 333. Therefore, in its attempt to make consent as 'clear and unambiguous' as possible, the *Sexual Offences Act* did not define consent (in any way beyond an 'agreement to make a choice') but instead listed a set of (rebuttable) circumstances in which non-consent will be presumed.

<sup>35</sup> Cowling and Reynolds (n 13).

<sup>36</sup> That is, where academic treatments and uses of 'consent' offer an examination of its meaning – most don't. See for example: T.P. Humphreys and E. Herold, 'Should Universities and Colleges Mandate Sexual Behavior? Student Perceptions of Antioch College's Consent Policy' (2003) 15 *Journal of Psychology & Human Sexuality* 35; C. Elliott and C. De Than, 'The Case for a Rational Reconstruction of Consent in Criminal Law' (2007) 70 *Modern Law Review* 225. Similar sources are also identified by M. A. Beres, "'Spontaneous" Sexual Consent: An Analysis of Sexual Consent Literature' (2007) 17(1) *Feminism & Psychology* 93. Notable exceptions include Haag (n 17) and Cowling and Reynolds (n 13).

These ‘foundations’ are often described as the ‘common sense’ meaning of consent<sup>37</sup> and represent the *third* contention guiding this thesis: that where attempts to offer definitions of consent do appear, they emerge from and within a discourse which prioritises a certain kind of freedom enacted by or belonging to certain kinds of subjects. This constitutes what I describe as the ‘consent-as-autonomy story’ – a narrative that has gained such widespread adoption that alternative accounts of the meaning of consent are not simply unintelligible, but non-existent. In this respect, consent acts as a ‘joker card,’ serving fairly different purposes depending on the context.<sup>38</sup> Legal assessments of the capacity for consent continue to be affected by one’s sexual orientation,<sup>39</sup> marital status<sup>40</sup>, and religious affiliations or beliefs.<sup>41</sup> The decisions of bipolar patients (including one who claimed to speak regularly with extra-terrestrials) to discontinue treatment have been upheld by the same courts which have determined Jehovah’s Witness patients to lack the capacity for consent (and thus treatment refusal) on the basis that their judgment was impaired by the ‘undue influence’ of their religious community.<sup>42</sup> While criminal law has emphatically forbidden the use of the doctrine of implied consent in sexual assault cases, injuries on the sports field are excluded from criminal prosecution on the basis that consent is implicitly given by mere participation in the game. What these fluctuations in meaning and application suggest is that despite claims to consent’s common sense, there is very

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<sup>37</sup> In her survey of sexual consent literature, Beres likens this to Bourdieu’s conception of ‘spontaneous sociology,’ where the presumed meanings of a concept are adopted without critical assessment of ‘the cultural, historical, and social forces that produced these meanings,’ (n 36), 95.

<sup>38</sup> Mariana Valverde uses this term to refer to certain key terms in Canadian judicial discourse (such as ‘risk of harm’) in cases involving the legal regulation of sexuality (e.g. obscenity); M. Valverde, ‘The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law’ (1999) 8(2) *Social & Legal Studies* 181, 184.

<sup>39</sup> See, for instance, the recent debates and literature surrounding Britain’s equalization of the age of consent for homosexual and heterosexual persons in the *Sexual Offences Act* 2003 amendments.

<sup>40</sup> See s. 150.1(2.1)(b) of Canada’s *Criminal Code*, R.S.C. 1985, C-46.

<sup>41</sup> *B.H. (Next friend of) v. Alberta (Director of Child Welfare)*, 2002 ABQB 371.

<sup>42</sup> See *Starson v. Swayze*, [2003] 1 S.C.R. 722 and *B.H.*, (n 41) respectively.



little about its use or meaning in law that is stable. What, then, is served by claims to the contrary?

While the ensuing discussion attempts to answer this inquiry in further detail, certainly one observable aim that assertions of consent's 'transparent' meaning accomplishes is the establishment of the consent-as-autonomy story to the exclusion of all other narratives.<sup>43</sup> This is explored in depth in Chapter One. The following section provides a preliminary overview of this narrative's basic assumptions.

#### Autonomy: The common sense of consent

The few in-depth analyses of the laws and practices surrounding consent that exist can be organized into three general disciplinary areas, namely: (i) political theory (wherein we find the original contract model); (ii) criminal law (largely focused on sexual consent and defences to assault); and (iii) medical law (where much of the literature addresses the doctrine of informed consent to treatment and intervention).<sup>44</sup> While this literature encompasses a wide array of perspectives, I would suggest that each is embedded in a discourse in which the content and scope of consent are delineated using a grammar of rational agency and possessive individualism. In these accounts, consent is configured as autonomy itself or, in the more critical analyses, as an inefficient model for reaching this ideal of self-governance. In both instances, the self-determining individual is maintained (if only, in more critical approaches, with an aim of

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<sup>43</sup> The establishment of this narrative as 'common sense' is explored in further detail in Chapter One. Its relationship to the establishment of neoliberal rationality as a foundationalist discourse is discussed in Chapter Five.

<sup>44</sup> Various specialized examinations of topical issues included within these treatises (e.g. age of consent) are also available although none, to my knowledge, attempt to examine consent across these three areas.

dismantling it).<sup>45</sup> This can be seen in even the most general summaries or treatments of consent, where its substantive content is aligned with the notion of capacity – an ability which, to be recognizable, must be exercised in reasonable or prescribed ways (reminiscent of the ‘freedom’ of the social contract.)

In his text, *The Law of Consent*, Peter W. Young suggests that most legal dictionary offerings on the term consent encircle three central elements, emerging from Fonblanque’s 18<sup>th</sup> century *Treatise on Equality*<sup>46</sup> and delineated in *Jowitt’s Law Dictionary* as ‘a physical power, a mental power, and a free and serious use of them.’<sup>47</sup> For consent to be established, these elements are to be employed in ‘an act of reason accompanied with deliberation, the mind weighing as in a balance the good or evil on either side.’<sup>48</sup> These components of competency, rational willing, and moral standing are summarised in David Archard’s Principle of Consensuality which states that ‘a practice, P, is morally permissible if all those who are parties to P are competent to consent, give their valid consent, and the interests of no other parties are significantly harmed.’<sup>49</sup> While Archard notes the need to clarify certain phrases within this general principle (e.g. ‘valid consent,’ or ‘competent’), he does attempt to identify some general conditions about the doctrine which flow from its ‘moral significance’ and its scope. This moral characteristic within both Canadian and British case law and secondary literature often houses explications of the necessary conditions of transforming an illegitimate transaction or event into a legitimate one, a transformation evoked by Heidi

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<sup>45</sup> See, for instance, Hunter and Cowan’s compilation which is organized around an understanding of ‘choice and consent as defining attributes of the sovereign, self-interested, masculine, liberal subject’ (n 14), 1.

<sup>46</sup> Specifically, Book 1, Ch. 2, s.1.

<sup>47</sup> As cited in P. W. Young, *The Law of Consent*. (Law Book Co 1986), 13.

<sup>48</sup> Young (n 47), 13.

<sup>49</sup> D. Archard, *Sexual Consent* (Westview Press, Boulder, CO 1998), 2.

Hurd with the term ‘moral magic.’<sup>50</sup> Thus the mere presence of a party’s ‘willingness’ to agree, assent,<sup>51</sup> or acquiesce,<sup>52</sup> is insufficient to satisfy consent’s normative requirement. This mental state must be enacted (or performed)<sup>53</sup> in contexts and ways which are recognised, at law, as demonstrating a certain form of capacity.

This capacity is presumed, at least in the first instance, to exist in all persons. As a guardian against tyrannical rule and arbitrary exercises of power, Locke envisioned this inalienable right to liberty of each person as both the rationale and the means of state legitimacy, subject to limitation so as to maximize human welfare and prevent (unjustifiable) injury. Law, for Locke, was thus a means of ‘confin[ing] the liberty [all persons] had by the Law of Nature.’<sup>54</sup> Yet to ensure acceptance of these confines and prevent their abuse, liberal understandings of state sovereignty suggest that these limitations must themselves be expressions of freedom, i.e. the acts of autonomous subjects. Consent emerges in these treatments as a signification of this autonomy, a means of participating in self-governance, and, as some authors have suggested, a marker of the boundaries of state power.<sup>55</sup>

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<sup>50</sup> Hurd (n 6).

<sup>51</sup> Archard distinguishes between ‘consent’ and ‘assent’ by suggesting the former is an agreement *to* a set of conditions whereas the latter is an agreement *with*, (n 49), 5. This distinction rests on an understanding of consent as a mental state made manifest (often through action). Other scholars support this view, see Young (n 47), 24.

<sup>52</sup> See, for example, Robin West, (n15).

<sup>53</sup> See H. Malm, ‘The Ontological Status of Consent and Its Implications for the Law of Rape’ (1996) 2 Legal Theory 147, where she argues that consent is a ‘signifier.’

<sup>54</sup> John Locke, *Two Treatises of Government* (first published 1689, Peter Laslett tr, CUP 1963), 2.129; as cited in K. McClure, *Judging Rights: Lockean Politics and the Limits of Consent* (Cornell University Press 1996), 250.

<sup>55</sup> ‘It is this notion [of consent] that is usually advanced as the minimal ground for differentiating between a “legitimate” or “acceptable” polity and its tyrannical or despotic counterpart’: McClure, (n 54), 2. McClure attributes these terms to Martin Seliger in *The Liberal Politics of John Locke* (Frederick Praeger, NY 1969) and John Dunn in *The Political Thought of John Locke: An Historical Account of the Argument of the ‘Two Treatises of Government’* (CUP 1969).

The subject who is thought to perform consent is the basis for many of the critiques of these accounts of consent-as-autonomy which take issue with the individualistic account of agency and its demand to be ‘left alone.’ With a view to the social character of human lives and decision-making processes, theories of a ‘relational’ autonomy have emerged which emphasize the need to consider the circumstances and relationships in which choices are made.<sup>56</sup> The difficulty these relationists identify with conventional approaches to consent is the equation of autonomy with mere choice.<sup>57</sup> This view, while often associated with the writings of John Stuart Mill, doesn’t capture the meaning of Mill’s notion of individuality, which required ‘persons to “own” or identify with certain desires, to cultivate certain feelings and impulses rather than others, thereby becoming well-developed human beings.’<sup>58</sup> The normative (and exclusive) consequences of this model are easily noted; freedom to choose is limited by the circumstances in which the consenting subject finds herself, a notion hinted at in Slavoj Žižek’s critique of the social contract’s ‘corporatist fantasy’ of a homogenous populace.<sup>59</sup> The vision of autonomy as freedom from state interference fails to account for disenfranchised members of a society who do not enjoy the minimal pre-conditions for political life and, according to some critics, serves to privatize inequality.<sup>60</sup> As Jackson and Sclater have noted, privacy is a sphere of life respected for the space it provides an individual to make choices and self-determine away from ‘the critical gaze of others,’ to the benefit of the socio-economically privileged and the detriment of those that remain.<sup>61</sup> In these instances, some form of state interference is needed to create the conditions for

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<sup>56</sup> J. Nedelsky, ‘Reconceiving Autonomy: Sources, Thoughts, and Possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 7; E. Jackson and S. Day-Sclater, ‘Introduction: Autonomy and Private Life’ in S.D. Sclater et. al. (eds) *Regulating Autonomy: Sex, Reproduction, and Family* (Hart Publishing 2009).

<sup>57</sup> O. O’Neill, *Autonomy and Trust in Bioethics* (CUP 2002).

<sup>58</sup> O’Neill (n 57), 30. O’Neill notes that Mill ‘hardly ever uses the word *autonomy*’ in his writing and never in relation to individuals (as opposed to state action, to which O’Neill notes only a passing reference.)

<sup>59</sup> S. Žižek, *The Sublime Object of Ideology* (Verso 1989), 126.

<sup>60</sup> C. Pateman, *The Sexual Contract* (Stanford University Press 1988).

<sup>61</sup> Jackson and Sclater (n 56), 1.

autonomous action or, as Joseph Raz has argued, autonomy needs to be more than the simple power to choose, but ‘an adequate range of choices.’<sup>62</sup>

Despite the persuasiveness of these critiques of autonomy, their application to considerations of consent has largely resulted in the reformulation (and expansion) of the procedural requirements of consent, thus leaving its foundations in autonomy intact. One example is O’Neill’s observation of how critiques of the embedded hierarchical relationship between patients and physicians have established a preeminent status for patient autonomy. Yet this has not led to an elaborate logic of character-building choices and reflective decision-making (à la Mill) or to a more communitarian approach to doctor-patient conversations. Instead, the result has been the development of elaborate procedural requirements to establish informed consent which amount to little more than a series of checked boxes.<sup>63</sup> Further, patients’ resistance to or interrogation of these technical requirements is subject to scrutiny on the basis of reasonableness, itself a standard informed by understandings of the self-interested individual.<sup>64</sup> In these instances, the foundationalist character of the consent-as-autonomy story is evident in that particular premises or categories are left unstated and unquestioned and indeed are unquestionable as a result of their presumed permanence and ahistoricity.<sup>65</sup> The result is the creation of a ‘common ground’ of analysis where the evaluative terms of reference

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<sup>62</sup> J. Raz, *The Morality of Freedom* (Clarendon Press 1986) 373.

<sup>63</sup> O’Neill (n 58).

<sup>64</sup> As Lori Beaman has suggested within the context of religious freedom to refuse medical treatment, the margins of the ‘reasonable’ patient are demarcated by articulations of risk and excess. The law’s assessment of what behaviour might fall into excessive categories of risk is informed (often explicitly) by a presumed shared understanding or common sense ‘community standards’: L. Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (UBC Press 2008). Beaman’s research focuses exclusively on court assessments of consenting capacity in cases involving religious objections to medical treatment; however, an example of the same practice at work in criminal law contexts can be found in the case of *R. v. Butler* [1992] 1 S.C.R. 452, a Canadian Supreme Court of Canada decision which decided the confines of obscenity on a ‘national community standard relat[ing] to harm not taste.’ This qualifier hints at the protection of the private sphere as a space free from state intervention unless justified under threat of harm. This is the foundation of the social contract – the surrendering of certain inalienable rights for the ‘common good.’

<sup>65</sup> Scott (n 21).

must themselves serve to both ‘authorize and legitimize analysis; indeed, analysis seems not to be able to proceed without them.’<sup>66</sup> In such a context, it is all but impossible to theorize about consent without invoking its story of autonomy. Many other (largely feminist) writers have sought a means to address questions of inequality and oppression outside these terms of reference, contending that a need exists for a ‘postindividualist concept of freedom.’<sup>67</sup> Yet finding the means of approaching this without re-engaging with the discursive foundations of autonomy is challenging. Articulations of consent in non-autonomy terms are absent from legal and theoretical discourse.

As such, an understanding of consent as a ‘homeland’ for self-governance is awarded a commonplace status, if not religious observance in law; moreover, there is a form of ‘fetishism’ to these rather opaque conceptualizations of consent in so far as these meanings are disconnected from the processes that brought them into being. They appear, to quote Marx, as ‘figures endowed with a life of their own, which enter into relations with each other and with the human race.’<sup>68</sup> This thesis is thus interested in the conditions of possibility for consent’s autonomy story so as to approach consent in ways that do not engage this grammar as readily. Much of the scholarship on consent is limited by its own ‘intellectual horizons’<sup>69</sup> where consent as an expression of free will is ‘found’ or prioritised in interpretations and evaluations of state-intrusive legislation.<sup>70</sup>

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<sup>66</sup> Scott (n 21), 780.

<sup>67</sup> C. Mouffe, ‘Hegemony and New Political Subjects: Toward a New Concept of Democracy’ in C. Nelson and L. Grossberg (eds) *Marxism and the Interpretation of Culture* (University of Illinois Press 1988).

<sup>68</sup> K. Marx, *Capital: A critique of political economy, vol. 1* (first published 1867, B. Fowkes, tr. Penguin, 1976), 165.

<sup>69</sup> D. Halperin, *One Hundred Years of Homosexuality and other essays on Greek Love* (Routledge 1990).

<sup>70</sup> Take, for example, the offence of ‘depriving one of her virginity’ in the Laws of Eshnunna, (thought to pre-date the Code of Hammurabi by almost two thousand years) which reads as follows:

s. 31. If a man deprives another man’s slave-girl of her virginity, he shall pay one-third of a mina of silver; the slave-girl remains the property of her owner.

The effect is to posit consent as ahistorical and pre-judicial. It takes on the quality of a ‘foundationalist discourse’ where the human subject and its agency are reified, presumed to have always existed, precluding questions about how selves are produced.<sup>71</sup> Further, such ‘foundations’ make interventions in contemporary debates about consent reiterative of these presumptions. As such, this project proposes to ‘read against the grain’ of dominant consent discourses which debate its application, its codification, and its inadequacies but leave alone the productive forces which have made its signification of autonomy intelligible (and incontestable). Below, I propose two methods of addressing this challenge.

#### Methodology: A Juridical Genealogy of Consent

Methodologically, this work diverges from conventional secularised analyses of consent to review its discursive operations across legal fields rather than strictly within them. Despite the emphasis placed by legal scholars on the diversity of forms, applications, and procedures that consent assumes in each legal field, the few explorations of the meaning of consent or its philosophical foundations within law tend not to observe these boundaries. Instead, concepts of autonomy, free will, voluntariness, knowledge, and rationality which appear in consent analyses travel across disciplinary divisions. This analysis will attempt to follow these movements, examining consent in both criminal and medical contexts in the jurisprudence of both Canada and the United Kingdom. These jurisdictions have been chosen because they are the areas of legal analysis I am most familiar with and because they often rely on one another in judicial treatments of consent both in criminal and medical law. Further, the recent Canadian approach to

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As cited in James B. Pritchard (ed), *Ancient Near Eastern Texts Relating to the Old Testament*, (3<sup>rd</sup> edn, Princeton University Press 1969), 162. A common description of this section of the Eshnunna Code is that it represents a ‘rape’ law, where rape is defined (contemporarily) as ‘non-consensual sex.’

<sup>71</sup> Scott, (n 21), 26-27.

establishing an ‘affirmative’ model of sexual consent is unique (in an international criminal law context) and coincides with recent statutory revisions in the United Kingdom to sexual offences and the meaning of consent. Finally, the defence of consent in sporting contexts (the focus of this project’s fourth chapter) has been developed by both British and Canadian courts in tandem.<sup>72</sup>

Second, I propose to treat ‘sexual consent,’ ‘informed consent,’ and the ‘defence of consent’ as historical artefacts which have been produced (and distributed) within specific contexts rather than as mere descriptions of naturally occurring or intrinsic characteristics of human states of being. In an attempt to further ‘skew’ my glance, I propose to select three vastly different historical periods where consent appears to perform different socio-political functions than dominant understandings of its role within contemporary medical and criminal law suggest it should. Contrary to conventional historical analyses in law, my aim is not to study a pre-existing notion of consent with an aim of discovering ‘what happened’ in a specific time period or to identify an origin of consent as a concept in criminal or medical contexts. Rather, my investigation of these artefacts is with the intention of unearthing alternative stories about the regulation of sexual behaviour, medical intervention, and bodily harm, stories occluded by the contemporary consent-as-autonomy narrative. Further, my aim is less to understand consent as a legal concept, discursive formation of liberalism or form of human cognition than it is to understand how the law’s past narratives of consent have shaped the way juridical subjects are formed in today’s jurisprudence.

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<sup>72</sup> For further discussion of this cooperative jurisprudence in the area of sports violence, see Chapter Four.



To this end, I propose taking up Foucault's approach of genealogy, 'for it really is against the effects of the power of a discourse that is considered to be scientific that the genealogy must wage its struggle.'<sup>73</sup> Posed as a means of 'render[ing] the familiar strange,'<sup>74</sup> genealogy might be characterized as the engine which powers Foucault's methodological approach of archaeology.<sup>75</sup> Foucault's archaeology is, as the name implies, a 'digging out' of the rules, codes, and schemes (written and unwritten) which produce and organize utterances and their meanings in the world. Rather than viewing statements as an indicator of the speaker's or writer's intentions (the substance of what might be thought 'surface' knowledge for Foucault), archaeology is interested in the ontology of discourse,<sup>76</sup> the 'conditions of existence' for statements. The 'dig' is thus centred on an inquiry into 'why these words now?' so as to uncover the contingencies, qualifications, contexts, and exclusions from which particular discursive practices and the knowledges they make possible emerge. Characterized predominantly as a 'history of the present,' the genealogical gaze is meant to reveal constitutive components of current subjectivities or practices which can't be seen from the place where the subject stands. It is an attempt to shift one's view; to 'look awry,' as Slavoj Žižek has suggested, as a means of seeing more in the distortion or skewed glance than is visible in the direct glare.<sup>77</sup>

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<sup>73</sup> M. Foucault, 'Two Lectures' in C. Gordon (ed & tr) *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Harvester Press 1980), 84.

<sup>74</sup> L.J. Graham, 'Discourse analysis and the critical use of Foucault' (Australian Association for Research in Education Conference, Sydney, AU, 27 November 2005), 4.

<sup>75</sup> '[G]enealogy,' Foucault explains, 'is the aim of the analysis and the archaeology is the material and methodological framework'; 'The Culture of the Self: Part II' (Lecture at the University of Berkeley California, 12 April 1983). Online at Berkeley Language Centre: <http://sunsite.berkeley.edu/VideoTest/foucault-cult2.ram>, last accessed: 16 December 2013.

<sup>76</sup> A. Peterson and R. Branton (eds) *Foucault, Health, and Medicine* (Routledge 1997), 35-41.

<sup>77</sup> Žižek (n 59); S. Žižek, *Looking Awry: An introduction to Jacques Lacan through popular culture* (MIT Press 1992). It may be important to note that many scholars have highlighted the crucial tensions and sites of dissent between his work and that of Foucault, (including Žižek himself). See: Slavoj Žižek, 'The Spectre of Ideology' in S. Žižek (ed) *Mapping Ideology* (Verso, London 1994); and S. Žižek, *The Ticklish Subject: The Absent Centre of Political Ontology* (Verso, London 2000). See also: F. Vighi and H. Feldner, 'Ideology Critique or Discourse Analysis?' (2007) 6(2) *European Journal of Political Theory* 141; and F. Vighi and H. Feldner, *Žižek: Beyond Foucault* (Palgrave MacMillan: Hampshire 2007).

Foucault described the task of a genealogist as one concerned with uncovering ‘erudite knowledge and local memories’ in a way that might be tactically used in the formulation of new knowledges.<sup>78</sup> As such, it necessitates looking in unfamiliar places both for the emergence of discursive practices and for the means by which these practices gain power and disciplinary control. In the present case, this has resulted in an exploration of what might be thought of as the ‘conditions of possibility’ for contemporary understandings of consent through an exploration of how consent was used and thought about in three very different legal and historical contexts. In each of these contexts (outlined below), the dominant narrative of consent-as-autonomy is either absent or simply can’t ring true given the particular conditions of social and political existence that are at work.

### Charting the Course: A Chapter Outline

The hunt for understandings of consent that might challenge or differ from the consent-as-autonomy story has meant travelling to some fairly unexpected places. The following chapters will ask the reader to consider sexual offences in Antiquity, medical ethics in the Middle Ages, and bodily harm on the sports field of the present day. We start, however, with a reconstruction of the consent-as-autonomy story. Chapter One will examine what might be thought of as the contemporary ‘canon’ of consent law in three legal areas to be discussed in upcoming chapters. These are: consent to sex, informed consent to medical treatment, and the defence of consent in sport. This contemporary picture of consent aims to reveal the dominance of the autonomy story even among more critical and reformist approaches to consent (and autonomy itself). Key

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<sup>78</sup> M. Foucault, ‘Powers and Strategies’ in Gordon (n 73), 83.

components to this portrait include voluntariness, rationality, and knowledge as preconditions or requirements for consent, and the role of legal paternalism in establishing these ‘parameters’ of consent. In addition, Chapter One examines the contributions of classical liberal scholars (such as John Locke) to the establishment of consent’s claim to the status of a ‘common sense’ and the productive power of this claim in contemporary understandings of consent (as autonomy).

Chapter Two marks the first of three substantive investigations into the conditions of possibility for contemporary understandings of consent, exploring how sexual behaviours and identities were regulated in Classical Athens and Rome during the Augustan moral reform period at the turn of the first century. This historical context is one where personal and socio-political autonomy was explicitly restricted to certain members of the polis (free male citizens). However, contemporary scholars often write about ‘female consent’ and ‘sexual consent’ when examining the legal regulation of sex of the period.<sup>79</sup> This suggests a possibility for unearthing moments of disjuncture in the construction of consent-as-autonomy which might serve to destabilise this foundational discourse. The discussion begins with an examination of the offences of sexual violence and transgression (e.g. adultery and prostitution) which figure most prominently in the period’s legal codes, Attic rhetoric, and Greek and Roman dramatic sources, and in contemporary Classics scholarship. The analysis is then organised around the functions which consent can be seen to perform in the context of early Athenian and Roman sexual life. This includes a role of proprietorship in relation to the political and patrilineage interests which sexual offence legislation of the period was

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<sup>79</sup> A. Laiou, (ed) *Consent and coercion to sex and marriage in ancient and medieval societies*, (Dumbarton Oaks 1993); and in the same collection; D. Moses, ‘Livy’s Lucretia and the Validity of Coerced Consent in Roman Law’; D. Cohen, ‘Consent and Sexual Relations in Classical Athens’; and D. Cohen, ‘Sexuality, Violence and the Athenian Law of *Hubris*’ (1991) 38 *G&R* 171.

meant to protect, and a role of political belonging, where consent served as a form of juridical and cultural recognition. Chapter Two suggests that what is at issue, at least in this ancient story of consent, is not a certain quality of free action, personal integrity, or the capacity for self-control, but rather a form of property protection and the constitution of the public domain. Further, through an examination of those who were excluded from the socio-political status necessary to enact forms of consent-as-proprietorship during the period (women, slaves, foreigners, and various ‘sexual transgressors’), the ability of consent to prescribe normative ways of being and acting is revealed, speaking to consent’s contemporary understandings of both voluntariness and rationality that must be enacted in specific ways to be recognizable.

Chapter Three continues the search for alternative stories of consent, investigating the introduction of the ‘knowledge’ component to consent within the medical field. David Halperin has suggested that genealogy is a method which ‘enables us to glimpse contingency where before we had seen only necessity; it thereby allows us to suspend, however briefly, the categories of thought and action within which we habitually conduct our lives.’<sup>80</sup> This positions this methodological approach as particularly apt for destabilizing one of the more secured juridical discourses of consent-as-autonomy: the informed consent doctrine. Leading medical ethics commentators have gone so far as to suggest that autonomy should be considered ‘the single most important moral value for informed consent.’<sup>81</sup> Discerning an account of medical consent uninformed by notions of self-determination and individualism requires an archaeological site far removed from the accepted twentieth-century origins of autonomy-based medical ethics. For this reason, Chapter Three examines consent within medieval accounts of medicine and its

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<sup>80</sup> Halperin, (n 69), 70.

<sup>81</sup> R. Faden and T. Beauchamp, *A History and Theory of Informed Consent* (OUP 1986), 18.

ethics, a period thought by many to represent the ‘Dark Age’ of medical practice.<sup>82</sup>

Most accounts of the ‘history’ of informed consent begin with the aftermath of human experimentation in the Second World War and the codes of practice emerging from the Nuremberg trials, suggesting that the doctrine itself is a twentieth century invention; however, there is some evidence that physicians’ codes of ethics contemplated consent during the Middle Ages.<sup>83</sup> Further, the period following the fall of the Roman Empire represented a rise in Christian influences in many legal and medical forums and Foucault remarks on the impact which this seemed to have on an ideal of purity being measured by an external physical integrity, rather than an ‘internal’ self-restraint.<sup>84</sup> The chapter attempts to track these influences in pursuit of an alternative account of medical consent, beginning with a brief picture of medieval medicine, including the requirements for both medical education and medical practice. Particular attention is paid to the influence of Christianity on who could become a physician and on what the content of medical training would entail. Against a backdrop where health and illness were understood to be acts of divine intervention, other medieval understandings of consent are explored, including theological analyses of Christian conversion and marriage formation, where the dilemma of knowing the inner will of another was of central concern, and the medieval market, where consent played a central role in the arena of trade and commerce. In each instance, an understanding of consent as a form of submission emerges, challenging the contemporary story of autonomy.

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<sup>82</sup> L. C. MacKinney, ‘Medical Ethics and Etiquette in the Early Middle Ages: The Persistence of Hippocratic Ideals’ (1952) 26(1) *Bulletin of the History of Medicine* 1.

<sup>83</sup> See, for instance, Loren C. MacKinney’s translation and study of source documents from 400 to 1100 A.D. which ‘bear resemblances to passages from Hippocratic works’ among other medical codes of practice, (n 82). Similarly, a 2010 article in the *Journal of Medical Ethics* discusses the discovery of a ‘written consent’ form signed in 1539, see: S. Selek ‘A written consent five centuries ago’ (2010) 36 *Journal of Medical Ethics* 639.

<sup>84</sup> Halperin, (n 69), 69.

Chapter Four examines constructions of consent as they appear in judicial determinations of assaults which occur within sporting contexts. Of central concern in this chapter is the contemporary understanding of ‘harm’ that the criminal law considers when establishing the limits of what a person can and cannot consent to and the underlying cultural assumptions that this understanding both relies on and produces. The chapter begins with a review of the leading cases in both Canada and the United Kingdom where consent has been used as a defence to assault, highlighting how the courts have defined ‘harm’ when determining which activities are excluded from the scope of consent on the basis of ‘public utility.’ Discursive formations of consent as a procedure or process of normative transformation are common in contemporary scholarship. Consent, thus articulated, is a means of altering normative relations, ‘turn[ing] a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography.’<sup>85</sup> This involves the drawing of distinctions between those acts which further a notion of the ‘common good’ and those which are deemed too harmful to be allowed. In Chapter Four, the law’s treatment of this principle of social utility is critiqued for its allegiance to hegemonic forms of both masculinity and capitalism, which privilege (and demand) the commodification of the body as capital in exchange for civic virtue. Operating as a criminal defense, consent transforms an otherwise criminal act into a legal one and, in the case of sporting activity, a universally desirable aim. A ‘right to do wrong’ is made out as certain acts (and subjects) are moved into the sphere of the ‘common good.’ In this respect, consent’s process of ‘transformation’ is also a productive power. It creates new normative understandings of legitimate action and the components of subjectivity it is said to harbour. How these

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<sup>85</sup> Hurd (n 6), 123.

subjectivities might be gendered or otherwise normatively constructed is examined in Chapter Four's conclusion, where it is suggested that consent's common sense is integrally connected to a neoliberal rationality that both prescribes and produces subjectivities in service to its basic tenets.

Chapter Five pushes on the characteristics of this neoliberal rationality as a foundationalist discourse, examining what might be thought of as the 'political economy' of consent. Building on Chapter Four's suggestion that contemporary uses of consent function within a logic where the rational subject is one who employs (and suffers) violence for the sake of economic and cultural capital, the consent-as-autonomy story is viewed from within the contemporary period's capitalist logic. The chapter asks what the meaning of 'social utility' or the 'common good' might be in a neoliberal world and, consequently, how freedom or autonomy might be understood when envisioned as dispositions of commodities. Chapter Five begins with a brief description of neoliberalism as a form of legal and political rationality that, while functioning as a 'site of truth,' manages to produce those subjects that self-govern in neoliberal ways, while demonizing and excluding those that don't. The case law from Canada and the United Kingdom in contemporary sexual assault law and medical law's treatment of informed consent is reviewed for evidence of this neoliberal rationality at work. This includes an examination of the arguments of social utility and risk that judicial treatments of consent employ and the role they play in maintaining neoliberal understandings of the self, while 'naturalizing' these conceptions through the construction of consent's common sense. Ultimately, Chapter Five establishes the ways in which the consent-as-autonomy narrative is one that emerges as part of the ideology of contemporary capitalism, serving to obscure the wide universe of alternate meanings

and functions that consent can be seen to perform in Ancient Greece or medieval medicine. Moreover, this autonomy story belies the ways in which these historical uses of consent continue to resonate in judicial treatments of consent in the present day. This suggests that the many difficulties identified in legal scholarship with what consent is or how it should be treated are not the central problem; rather the problem is consent itself. This is a concept that has been widely held to be illusory,<sup>86</sup> a ‘placeholder’ for ideals of freedom and equality that are valued as dearly as they are dismissed as unrealisable. Yet the ideals consent is meant to house exist only for those who enact freedom or personal autonomy in ways that embed and naturalize the social relationships and normative subjectivities they depend upon.<sup>87</sup> This creates the imperative to move beyond understandings of consent as an ‘illusion,’ so as to view its more productive effects.

The thesis concludes with a discussion that aims to take this longer view, examining the implications for legal and cultural subjectivity of a consent-as-autonomy story that is in service to neoliberal rationality. Likening this narrative to the new ‘art of government’ that Foucault examined in his own study of the emergence of neoliberalism, I position consent as a means of producing and managing a certain kind of freedom. The consenting subject is ‘free’ to act as she wishes, provided she does so in ways that are in alignment with neoliberal understandings of the ‘common good.’ Consent thus serves as ‘a limited use of an empty liberty.’<sup>88</sup> And while the ideal of autonomy that consent is

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<sup>86</sup> See, for example, D. O’Neill et. al., *Illusion of Consent: Engaging with Carole Pateman* (Penn. State. Univ Press 2008).

<sup>87</sup> This is akin to the observation Marx and Engels made about personal freedom, contending that it ‘existed only for the individuals who developed within the relationships of the ruling class, and only insofar as they were individuals of this class’: *The German Ideology* (Lawrence & Wishart, London 1970), 83.

<sup>88</sup> M. Foucault, *Madness and Civilization: A History of Insanity in an Age of Reason* (Vintage Books 1965), 261.



meant to signify is an appealing one, the self-rule it promises is not without its preconditions. Any story of consent that positions an ahistorical, pre-judicial, and self-governing subject will also necessarily produce experiences and identities which fail to approximate this norm. How does the law's continuing project to 'fix' consent produce recognisable objects (or abjects) of scrutiny? And what might an investigation into the 'common sense' of consent help us to grasp about the frames of cultural and legal intelligibility at work in consent law today? It is to these questions that the discussion's final pages turn their aim.

## CHAPTER ONE – The Consent-as-Autonomy Story

‘We are definitely not all liberals now. But we do all live in a liberal world.’<sup>89</sup>

### Introduction

The indivisible association of consent with autonomy is commonplace in legal and political scholarship where consent is understood as a core element of personhood.

There are, however, preconditions to the freedom and subjectivity that consent is meant to signify. One must first demonstrate, for instance, a *capacity* to consent, and the acts to which one is consenting must not be irrational or unreasonable. Consent, to be valid, must be adequately informed and enacted voluntarily by clear-thinking (and recognizable) subjects, for socially valuable ends. Thus, despite its promise of universal self-rule and independence, consent is a rather selective and highly governed means of enacting freedom. Some subjects are excluded from its presumption of autonomy, marginalized from the scope of consent not simply because of non-conformity to hegemonic ideals of subjectivity and statehood, but by way of being unintelligible within them. There is, then, a paradox in the story of autonomy that is told about consent which forecloses certain forms of personhood or liberty in the name of others.

This chapter seeks to interrogate this paradox through a contextualization of contemporary deployments of consent in each of the three legal areas examined in upcoming chapters, namely: consent to sex, informed consent to medical treatment, and the defence of consent in sport. This modern account of consent aims to reveal the pervasiveness with which consent is defined as a form of personal autonomy, even

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<sup>89</sup> A. Wolfe, *The Future of Liberalism*. (Knopf 2009), 255.

among more critical and reformist approaches to consent (and autonomy itself) that recognize its internal contradictions and an inequity in its application. An examination of the law's three most prevalent 'preconditions' of consent (i.e. knowledge, voluntariness, and rationality) and their roots in liberal concerns with legal paternalism forms part of this analysis. Secondly, this chapter explores how this narrative of autonomy gains such widespread adoption through an invocation of a 'common sense' that not only serves to 'naturalize' the conditions needed for liberal accounts of autonomy, but also establishes the frames of intelligibility that exclude all other notions of what consent might be or do. Ultimately, this chapter contends that to suggest that autonomy is central to understandings of consent is to understate the matter. Autonomy is not simply the most popular or widely accepted understanding of consent; it is the only story there is. How this narrative is employed to limit the content and scope of consent on the basis of conformity to particular forms of (liberal) subjectivity is explored in the chapter's conclusion, highlighting the need to uncover alternative understandings of consent (to which the ensuing chapters take aim).

### Mediated Magic: Paternalism and its Paradox

The understanding of the human will as serving to eradicate wrongdoing is often attributed to ancient history, sourced in the Roman maxim *volenti non fit injuria* ('to the willing no injury is done')<sup>90</sup> and used by the courts to cement the principle that one should be able to consent to anything, even the impossible.<sup>91</sup> Yet Onora O'Neill has suggested that autonomy in the antiquity context referred to the self-governance of

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<sup>90</sup> Some commentators have suggested the 'germ' of this maxim can be found even earlier. See N.G.L. Child, 'Volenti non fit injuria' (1905) 17 *Juridical Review* 43, who sources it in Aristotle's *Ethics*, Book V, (section ix).

<sup>91</sup> 'The law will suffer a man of his own folly to bind himself to pay on a certain day if he does not make the Tower of London come to Westminster,' claimed a 14<sup>th</sup> century English court; as cited in T. Ingman, 'A History of the Defence of *Non Volenti Non Fit Injuria*' (1981) 26 *Juridical Review* 1, 3.

states rather than the actions of individuals.<sup>92</sup> This latter association of consent with a notion of inviolable individualism owes more to the work of early theorists of liberalism, such as John Stuart Mill whose text, *On Liberty*, employed it as a means of balancing the competing interests of individual and state action.<sup>93</sup> O'Neill has suggested that contemporary understandings of autonomy stem from Mill's work and amount to a kind of 'self-legislation' which is not more (nor less) than the establishment of a set of principles that all persons can employ to both govern their own behaviour and judge that of others. Consent, in this way, is understood as an exchange (as in contract law) or a process whereby freedom (in the form of rights) is surrendered for some other aim (e.g. freedom in the universal).<sup>94</sup>

The legitimacy-granting character that is ascribed to consent has had implications for how the scope of the doctrine is understood to operate in law, bringing to the fore one of the underlying tensions in liberalism between the sacred ideal of individual autonomy and the state's forays into legal paternalism. Ostensibly, this discord is mediated through a narrowly interpreted harm principle, often attributed to Mill,<sup>95</sup> where governments are permitted some coercive power over the citizenry so as to act in their best interests. This necessarily places limits on the 'moral magic' of consent when some actions are deemed to be too harmful to be permitted merely on the basis of individual will. As Ashworth notes:

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<sup>92</sup> Chapter Two examines sexual consent in Ancient Greece and Rome at the turn of the first century where the interests of the state are found to be paramount in terms of the functions consent was meant to perform.

<sup>93</sup> Albeit, as O'Neill informs us, without mentioning the word 'autonomy' in reference to individual action at all (n 57), 30.

<sup>94</sup> Faden and Beauchamp (n 81); R. T. Hull, 'Informed Consent: Patient's Right or Patient's Duty?' (1985) 10 *Journal of Medicine and Philosophy* 183.

<sup>95</sup> See: J. Feinberg 'Legal Paternalism' (1971) 1(1) *Canadian Journal of Philosophy* 105; D. Dyzenhaus, 'John Stuart Mill and the Harm of Pornography' (1992) 102(3) *Ethics* 534. See also R. Vernon 'John Stuart Mill and Pornography: Beyond the Harm Principle' (1996) 106(3) *Ethics* 621, for an alternative reading of Mill's *On Liberty* and the standard approach to the harm principle.

[I]ndividual autonomy has both positive and negative aspects: on the one hand it argues for liberty from attack or interference, whereas on the other hand it argues for the liberty to do with one's body as one wishes... If a person wishes to give up her or his physical integrity in certain circumstances or to risk it for the sake of sport or excitement, should the criminal law allow the consent to negative what would otherwise be a crime?<sup>96</sup>

Joel Feinberg has suggested that this conundrum results from a misreading of the *volenti* maxim so as to interpret it as saying something about 'harm' whereas it might be better understood to be directed towards legal wrongs.<sup>97</sup> This re-reading results in a view of consent as vitiating a liability claim rather than a harm or injury, similar to a waiver of legal right(s). Based on this view, Feinberg argues a better reading of the *volenti* maxim might be: 'To one who freely consents to a thing no *wrong* is done, no matter how harmful to [her/]him the consequences may be.'<sup>98</sup> This suggests that the 'magic' of consent to transform wrong to right is constrained by the liberal understanding of autonomy as individualised agency, where legal paternalism is positioned as its greatest foe. Thus any state intervention which impedes an individual's exercise of free will (even if to prevent self-inflicted harm) amounts to a coercion which is itself too harmful to allow.<sup>99</sup> This has the effect of exempting certain 'problematic' or even 'unconscionable' interactions from the label of 'illegitimate,' (and thus criminal and civil liability) on the basis that the (self-inflicted) harm they occasion is less than the harm that would be incurred by state interventions to prevent it.<sup>100</sup>

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<sup>96</sup> A. Ashworth, *Principles of Criminal Law*, 5<sup>th</sup> ed. (OUP, Oxford 2006), 318.

<sup>97</sup> Feinberg (n 95).

<sup>98</sup> Feinberg (n 95), 107.

<sup>99</sup> Feinberg (n 95), 108. Feinberg maintains that this should effectively exclude self-inflicted and consensual harm from the category of 'harm' altogether on the basis that to prevent such harm the state would need to act too coercively to be proportionately justifiable. Moreover, Feinberg argues that 'individuals themselves... can know their own true interests better than any outsiders can' and therefore 'outside coercion is almost certain to be self-defeating.'

<sup>100</sup> One such example is the 'complex relationship,' proposed by Dripps where within the context of an otherwise satisfying marriage, one partner (in Dripps' case, the wife) 'cooperates' with the other's sexual advances despite no desire to do so. Dripps suggests she does this for a myriad of reasons, ('a sense of reciprocity, of doing a favor for her best friend; fear that he might seek satisfaction elsewhere, etc...') but that this circumstance cannot be deemed to be non-consensual – despite the presence of constraints –

There are, however, many circumstances in which interference with another's liberty or autonomous action might be deemed necessary or advisable for a multitude of reasons ranging from a broad sense of social welfare or the 'common good' to an assessment of individual interests or self-protection.<sup>101</sup> Indeed, the classic tenets of liberalism first penned by the political theorists of the seventeenth and eighteenth centuries were composed with these restraints on autonomy in mind.<sup>102</sup> This represents what Kultgen has suggested is the dilemma created by absolutist positions on autonomy where 'if one defines autonomy so that it always deserves respect, no one is autonomous; and if one defines it so that everyone is autonomous, it does not always deserve respect.'<sup>103</sup> This has prompted many liberal theorists to conceptualise varying degrees of justifiable paternalism. Feinberg distinguishes between cases of 'hard' and 'soft' paternalism in an attempt to provide justification for state intervention to prevent harm in some cases while opposing it in others.<sup>104</sup> Hard paternalism is thus understood to be coercive state action (e.g. criminal legislation) which prohibits individuals (against their will) from engaging in conduct that is harmful to themselves and/or others. Soft paternalism, on

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because these constraints do not leave either party without the capacity to bargain. Furthermore, 'so long as the complex relationship is accepted as legitimate, the fact that only one party to sex found it enjoyable does not establish illegitimacy, given compensation in some nonsexual form,' D. Dripps, 'Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent' (1992) 92 Colum. L. Rev. 1780, 1789, 1801-1802. For a critique of this position, see Robin West's article (n 15).

<sup>101</sup> The distinctions among these various justifications for infringements of liberty are the source of the many divisions within liberalism itself, e.g. between 'old' and 'new' liberalisms (the latter perhaps best exemplified by the concerns with social justice motivating Rawls' 'difference principle' in his seminal text, *Theory of Justice* (Harvard University Press 1971). For a general discussion of these differences, see: G. Gaus and S. D. Courtland, 'Liberalism' in E.N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2011 Edition), online at: <<http://plato.stanford.edu/archives/spr2011/entries/liberalism/>>. Last accessed: 17 December 2013.

<sup>102</sup> Certainly the original 'social contract' espouses this view and the majority of political theories which endorse classical liberalism employ a utilitarianism or contractarianism which assumes some limitations on individual autonomy are necessary for a functional social order. These views are well canvassed in the first two chapters of Horatio Spector's *Autonomy and Rights: The Moral Foundations of Liberalism*. (OUP 2008). Don Herzog (n 14) also makes the argument that consent theory emerged in response to Hobbes' 'masterless man' and the dangers he was thought to pose to civil order.

<sup>103</sup> J. Kultgen, *Autonomy and Intervention: Parentalism in the Caring Life*. (OUP 1995), 89.

<sup>104</sup> J. Feinberg, *Harm to Self* (OUP 1986).

the other hand, is a more qualified form of state coercion reserved for determinations of an individual's will, exemplified by Mill's now famous example of a man about to cross a damaged bridge.<sup>105</sup> While the hard paternalist would prevent the man from crossing irrespective of his own wishes, the soft paternalist would be justified in detaining the man only long enough to determine whether he is aware of the bridge's state of disrepair and its dangers, leaving him to his own actions once the nature of his will has been settled.

The scope of, limits to, and justifications for the state's acts of soft paternalism are the subject of much debate in legal and moral philosophy, political theory, bioethics, criminal and contract law and it is within these deliberations that most of the contemporary discussions of consent take place (be that in the name of enhancing the informed choices of patients or contractors, the physical integrity of sexual actors or sport participants, or in debating the proper boundaries of free-acting citizens.) This literature is largely concerned with the necessary conditions, capacities, circumstances, and evidences of consent. How much harm can a free citizen consent to? What steps or procedures must be taken to ensure a choice is made knowledgeably? What individual acts will garner more widespread harm if allowed than the harm of state-imposed infringements on personal freedom will incur? And so on. There is a paradox in this treatment of consent, however, given that this problem of paternalism and how (or if) it should be addressed stems from the liberal commitment to autonomy. Therefore even attempts to offer solutions to or critiques of the problem must engage with this same

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<sup>105</sup> Mill phrases the example as such: 'If either a public officer or anyone else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river.' *On Liberty* (first published 1859, Elizabeth Rapaport ed, Hackett, Cambridge 1978), 95.

narrative of autonomy. Consent discussions are thus also confined to this box.<sup>106</sup> Take, for instance, Tom Beauchamp's defence of soft paternalism in the field of 'biobehavioral control'<sup>107</sup> on the basis that such acts do not interfere with patient autonomy given that the patient lacks the requisite characteristics of an autonomous actor when the consent that is offered has not been 'adequately informed.' Beauchamp explains:

It is not a question of protecting a man *against himself* or of interfering with his *liberty of action*. He is not *acting* at all in regard to this danger. He needs protection from something which is precisely *not himself*, not his intended action, not in any remote sense of his own making.<sup>108</sup>

Feinberg makes a similar point, suggesting that we should not 'expect anti-paternalistic individualism to deny protection to a person from his own nonvoluntary choices, for insofar as the choices are not voluntary they are just as alien to him as the choices of someone else.'<sup>109</sup> For Beauchamp, any number of factors can serve to 'constrain free choice' in this regard, 'such as inadequate reflection, transitory desires, inner

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<sup>106</sup> In a recent article, Keith Hyams notes this presumed inseparability, suggesting that disagreements about the necessary conditions of consent are '[c]entral to many of the most violent clashes fought on the battleground of consent' and that reaching an understanding 'of the limits to consent's capacity to legitimise is key to unravelling the foundations of liberal morality and its attendant conflicts'; 'When Consent Doesn't Work: A rights-based case for limits to consent's capacity to legitimise' (2011) 8(1) *Journal of Moral Philosophy* 110.

<sup>107</sup> T. Beauchamp, 'Paternalism and Biobehavioral Control' (1977) 60(1) *The Monist* 62. Beauchamp defines biobehavioral control as covering a series of what he refers to as 'technological capacities'" namely: information control (consisting of psychotherapy and behavioural engineering); biopsychological control (consisting of electrical stimulation of the brain, psychosurgery, and the use of psychotropic drugs); and biomedical control (consisting of life-sustaining and reproductive controls and genetic engineering).

<sup>108</sup> Beauchamp (n 107, 67-68). Beauchamp is even more explicit about the correlativity between consent and autonomy in a much later work which he introduces in the following way:

'This distinction between the factual and the moral is vital, but it may foster precarious claims... I will assess these claims with the objective of determining the nature of consent and autonomy. I will also examine what constitutes a consent, what sort of consent is valid, who qualifies as autonomous, and what sort of autonomy merits respect. I will argue that moral notions – in particular, the obligation to obtain consent and the obligation to respect autonomy – should affect how we construct theories of consent, theories of autonomous action, and theories of the autonomous person'; 'Autonomy and Consent' in F. Miller and A. Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (OUP 2009), 56.

<sup>109</sup> Feinberg (n 95), 112.



psychological compulsions, family pressures,’ and so forth.<sup>110</sup> Thus, despite the prominence awarded to autonomy in the liberal account of consent, it is a liberty to self-govern that comes with prerequisites. Further, it is from this liberal story of consent-as-autonomy that contemporary law gleans a number of factors which serve to vitiate or negate consent on the basis of their impact on one or more of these preconditions, (the presence of fraud, duress, coercion, false pretences, or mistake are common examples). Although both Feinberg and Beauchamp in the excerpts above allude to one of the more commonly cited ‘pre-requisites’ of consent (i.e. voluntariness), these stipulations can take different forms depending on whether the commentator is a moral philosopher, contract lawyer, rights advocate, bioethicist, critical theorist, and so on.<sup>111</sup> These components also serve to differentiate and produce particular subjectivities ‘capable’ or ‘incapable’ of consenting, thus defining and regulating not simply what might be surrendered (e.g. liberty) but for whom this surrendering is possible.

The following section turns its focus on three of the more common ‘preconditions’ of consent, namely: voluntariness, knowledge, and rationality. In each instance, the law’s conventional approach to the precondition is examined alongside a discussion of some of the critiques these approaches have garnered, demonstrating the integral role the consent-as-autonomy story plays for each. While discussed separately below, it should be noted that these preconditions are both correlative, insofar as they rely on one another for coherence, and cumulative, in terms of their role in establishing a valid

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<sup>110</sup> Beauchamp (n 107), 70.

<sup>111</sup> For instance, Larry Alexander suggests consent requires the pre-conditions of capacity, information, and motivation, while Victor Tadros endorses a contemplation of the magnitude of the harm, the self-regarding vs. other-regarding duties that may face the individual, and principles of sanctity that might apply to the decision: L. Alexander, ‘The Moral Magic of Consent (II)’ (1996) 2 *Legal Theory* 1352; V. Tadros, ‘Consent to Harm’ (2011) 64 *Current Legal Problems* 23. Tom Beauchamp, when discussing the informed consent doctrine, identifies the three elements of voluntariness, understanding, and consent (understood as a ‘favourable decision and an authorization’) as the doctrine’s key components, (n 110), 57.

consent, i.e. one which is offered voluntarily, knowingly, and rationally. This interdependence (examined in greater detail in the next section) is derivative of liberalism's theory of state legitimacy. It is predicated on the fiction of political consent and its resultant paradoxes of autonomous action. In other words, the need to limit both what kinds of persons may consent and what kinds of things they may consent to emerges from a theory of state legitimacy grounded in individual autonomy: if persons are free to choose, they may choose not to be governed (or at least not to be governed by the same principles that might best serve the state).<sup>112</sup> Thus, the preconditions of consent establish not simply that a person must know what she is consenting to prior to voluntarily and rationally consenting, but rather that there are allowable (and unallowable) ways of willing, knowing, and rationalizing produced by these very preconditions themselves.

### The Parameters of Consent: Productive Preconditions

#### *(i) voluntariness*

Broadly understood as a legal recognition of free or unrestrained choice, voluntariness is arguably the most common ground upon which consent's validity is contested. Within liberal political theories of the state, government is positioned as a 'voluntary association' and while certain coercive elements will be necessary parts of state functionality, it is the degree of approximation to this ideal of voluntariness which underlies state claims to legitimacy and, as we have seen, critiques of its paternalism.<sup>113</sup>

A similar formula functions in both medical and criminal law's theorisations of consent.

Informed consent in medical law has been identified as serving legal, moral, and clinical

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<sup>112</sup> Mark Kann refers to this as the 'dialectic of consent' where 'the government which promotes conscientiousness and reason simultaneously maximizes the potential for citizens to dissent. Therefore, the most legitimate government is the one which promotes and tolerates the greatest challenge to its own authority'; 'The Dialectic of Consent Theory' (1978) 40(2) *Journal of Politics* 386, 388.

<sup>113</sup> R. Higgins, *The Moral Limits of Law* (OUP 2004), 95-96.

aims.<sup>114</sup> Alongside ideals of preserving a patient's right to self-determination and protecting physicians from legal sanctions against battery and assault, the voluntary participation or assent to treatment is thought to facilitate treatment and, ideally, improve patients' clinical experiences.<sup>115</sup> Stemming from the Nuremberg Code, voluntariness (in its association with autonomy) is 'the most frequently mentioned moral principle in the literature on informed consent.'<sup>116</sup> This is an interesting contention given the prevailing view that medical treatment operates predominantly on the basis of tacit consent. Even where a consent form is signed, a patient's consent is conceptualised as on-going, subject to revocation at any time. Emily Jackson identifies three factors which serve to vitiate consent in medical contexts: coercion, undue influence, and mistake.<sup>117</sup> Each of these is discursively linked in the case law to consent's precondition of voluntariness and positioned as an interference with the free-willed action of the patient. English courts have been reluctant to find coercion to have vitiated consent to medical treatment unless a 'real' threat can be determined to have diminished the patient's free choice, even when the political or social context the patient is in might significantly alter this range of options (e.g. prison).<sup>118</sup> Tom Beauchamp has suggested a distinction between considerations of coercive factors that are external to the patient versus those that are internal (the latter, I would suggest, which are more often addressed by the courts in terms of another precondition of consent, i.e. 'rationality' discussed at length below.)<sup>119</sup>

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<sup>114</sup> E. Jackson, *Medical Law: Text, Cases, and Materials* (OUP 2009), 217.

<sup>115</sup> P. Agre, et. al., 'Patient satisfaction with an informed consent process' (1997) 5(7) *Cancer Practice* 162.

<sup>116</sup> Faden and Beauchamp (n 81), 7. Yet in his 2009 explication of the doctrine, Beauchamp has suggested that 'voluntariness is almost certainly the most neglected dimension of consent in contexts of medical practice and research' on account of the over-emphasis on the 'information' component of informed consent, (n 108), 55

<sup>117</sup> Jackson (n 114).

<sup>118</sup> *Freeman v. Home Office (No. 2)* [1984] 1 All E.R. 1036.

<sup>119</sup> Beauchamp (n 108).

The same practice can be found in criminal law contexts. To be considered valid, consent must be given voluntarily where the level of volition is assessed in conjunction with what a reasonable (i.e. rational) person can be considered to have done with the knowledge the victim had at the time. This is predominant in assaults which arise within the context of sporting activities or what courts have termed ‘horseplay’ where participation in the activity is often positioned as a form of tacit consent, provided the level of risk does not exceed what can be deemed ‘reasonable.’ Although some of the difficulties associated with judicial reliance on standards of reasonableness are explored in the ensuing subsections which examine the preconditions of knowledge and rationality, the requirement of voluntariness highlights one of the oldest ‘dilemmas’ of consent theory and its application. Kann states the problem in this way:

If we are social beings, how can we consent ‘voluntarily’? Do our desires and reasons reveal our ‘true’ selves or do they merely reflect social prejudices? Herbert Marcuse’s challenge that consent procedures are vacuous if our desires and reasons are socially determined is a serious one.<sup>120</sup>

Although perhaps easy to dismiss as a merely esoteric philosophical inquiry, the difficulty in matching the ideal (if not hypothetical) consenter with the lived realities of the actual citizen has been a tangible challenge identified in much of the literature on consent, largely with respect to its precondition of voluntariness. Carole Pateman, for instance, suggests that consent theorists suffer a ‘standard embarrassment’ when ‘attempt[ing] to show how and when citizens perform this act [of consent]’ given that grand assertions of its universality and fundamental nature tend to ‘gloss over the ambiguity... about which individuals or groups are capable of consenting and so count as full members of the political order.’<sup>121</sup> For Pateman, among others, the notion of consent emerges from a ‘voluntarist theory of society’ rooted in early political

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<sup>120</sup> Kann (n 112), 389.

<sup>121</sup> C. Pateman, ‘Women and Consent’ (1980) 8(2) *Political Theory* 149, 150.

liberalism which maintains that any interferences with a citizen's liberty must be freely undertaken. Yet as Pateman has observed, such formulations do not take account of the structural inequalities within society (and the organisation of its members) which work to prevent any form of pure voluntariness.<sup>122</sup> Instead, the 'bitterest fruit of the liberal deception' is when the most disadvantaged believe social inequity to be a result of misfortune rather than the organisation of the social order itself.<sup>123</sup> Wendy Brown has argued that this is attributable to the nature of the social contract itself, whereby protection is granted to citizens in exchange for obedience.<sup>124</sup> Consent, in this frame, appears more as an act of submission than voluntary agreement. '[I]t marks the presence of power, arrangements, and actions that one does not oneself create but to which one submits.'<sup>125</sup>

Aside from these broader based concerns with the amount of voluntary action that might be possible in an unequally ordered society, consent's precondition of voluntariness is evaluated in practice in exclusionary ways. This stems from the same measured approach to paternalism which Feinberg (and others) have advocated given the paradox of autonomy that classical liberalism creates and maintains. Liberal notions of autonomy attempt to house both individual self-determination and individual well-being, where the latter can often fall into conflict with the former.<sup>126</sup> Feinberg's soft paternalism brings voluntariness to the fore, questioning how voluntary any act of self-

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<sup>122</sup> C. Pateman, *The Disorder of Women* (Polity Press 1989).

<sup>123</sup> J. Mansbridge, 'Carole Pateman: Radical Liberal?' in O'Neill et. al. (n 86), 24.

<sup>124</sup> Charles Mills, working from Carole Pateman's work in *The Sexual Contract*, suggests this entrenched social inequality creates a 'class contract' rather than a social contract: C. Mills, 'The Domination Contract' in O'Neill et. al. (n 86).

<sup>125</sup> W. Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press 1995), 162-163. This is akin to the medieval understanding of consent as a form of submission to God – something that is explored at length in Chapter Three. The difference, of course, is that in the medieval medical and canonical context, consent was not presented as a form of personal freedom as it is within liberal articulations.

<sup>126</sup> D.W. Brock, 'Paternalism and Autonomy: review of Feinberg's *Harm to Self* and VanDeVeer's *Paternalistic Intervention*' (1988) 98(3) *Ethics* 550.

harm can be. He suggests that '[w]hen there is a strong presumption that no *normal* person would voluntarily choose or consent to the kind of conduct in question, that should be a proper ground for detaining the person until the voluntary character of his choice can be established.'<sup>127</sup> This demonstrates that consent's precondition of voluntariness is often assessed alongside a consideration of the perceived reasonableness of either an act of self-harm or an assumption of risk. Further, Feinberg's own use of the term 'normal' points to a dominant (if not hegemonic) notion of reasonableness that is at work in these considerations, perhaps most poignantly when the courts have made determinations of consent on 'public policy' grounds.<sup>128</sup> As noted by the UK Law Commission in its 1994 *Report on Consent*:

The law clearly reserves the right to say that some activities do not qualify for special exemption at all; just as it reserves the right to say that, within a lawful sport, public policy requires that injury caused by some of the sport's practices, even though accepted by the injured player, should be dealt with as criminal in nature.<sup>129</sup>

This reveals that in both the criminal and medical contexts, the would-be-consenter's voluntariness is not a stand-alone consideration but rather one linked (arguably inseparably) to both the level of information or knowledge the participant can be said to have had when expressing a voluntary will and an assessment of the reasonableness or rational acceptability of that volition. These two preconditions are examined in greater detail below.

## (ii) *knowledge*

The word 'consent' is derived from the Latin, *consentire*, meaning 'to feel or sense with' –an origin which alludes to the cognitive and emotional requirements that make

<sup>127</sup> Feinberg (n 95), 114 (emphasis added).

<sup>128</sup> See, for instance, the English cases of *Brown* (n 27); and *Wilson* [1996] 2 Cr App Rep 241.

<sup>129</sup> Law Commission (UK), 'Consent and Offences against the Person' (Law Com No 134, 1994), 22-23.

up a frequently articulated component of consent in law: knowledge. Alongside considerations of voluntariness and rationality, the law's assessment of the validity of consent is reliant on a perception of a subject's ability to know and understand the relevant circumstances of a consent (or its waiver). Although competence is often positioned as a precursor to the requisite elements of consent, one's *capacity* to consent is frequently defined in relation to the nature of information or knowledge about the intended treatment or intervention the would-be-consenter can be determined to have. Put most simply, a person is held to be competent to consent if they are able to understand what they are consenting to.

The relationship between consent and knowledge is most explicitly recognized in the medico-legal doctrine of informed consent. This doctrine is heralded by some legal scholars as a signification of the 'special' or 'fiduciary' relationship existent between physicians and patients where the patient's on-going need to be knowledgeable of the nature of their consent is central. Although many bioethicists suggest that the Hippocratic Oath served to preclude any entitlement patients might have to information about their condition or its prognosis, the 1767 English case of *Slater v. Baker and Stapleton*<sup>130</sup> is often marked as the dawn of the physician's legal duty to ensure patients were made aware of the procedures awaiting them. Comprehension of these events, however, was not a matter to preoccupy the law's consideration of informed consent until later in the twentieth century when a 'partnership model' of decision-making would be introduced into medical law, establishing the role of the self-governing patient.<sup>131</sup> This has led some commentators to suggest informed consent is more aptly described as a 'process' rather than a doctrine given the complex procedures involved in

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<sup>130</sup> 2 Wils KB 359, 95 E.R. 850 (1767).

<sup>131</sup> Jackson (n 114).

ensuring patients both know and understand the nature and consequences of the relevant medical intervention.<sup>132</sup> This process model entails a series of steps, including an initial report of injury or illness, documentation of a patient's history, diagnosis and/or designation of a care plan, disclosure of treatment options and risks, confirmation of a patient's understanding of available options and associated contingencies, and the patient's (ongoing) decision with respect to treatment(s).<sup>133</sup>

The precondition of knowledge figures large in this process model and is perhaps most explicitly represented by the 'consent form,' thought to signify a patient's clear understanding of the treatment in question (despite ample evidence to the contrary).<sup>134</sup> Where comprehension is an issue, some medical scholars have suggested that the solution lies in enhanced procedural requirements, such as a formal assessment of language and reading comprehension skills administered prior to the signing of a consent form,<sup>135</sup> whereas others have experimented with shortened consent forms as a means of improving patient understanding.<sup>136</sup> Still others have suggested that the problem of ascertaining whether a patient has sufficient knowledge of a treatment prior to granting consent lies in the unequal power relations between doctors and patients. In her consideration of tort law's treatment of medical malpractice cases, Emily Jackson argues that the doctrine of informed consent serves as a kind of 'shorthand for two distinct duties: the duty to obtain the patient's consent before treatment, and the duty to

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<sup>132</sup> L.E. Rozovsky and F.A. Rozovsky, *The Canadian Law of Consent to Treatment* (Butterworths 1990).

<sup>133</sup> Rozovsky and Rozovsky, (n 132).

<sup>134</sup> See, for instance, a study conducted by Lavelle-Jones et. al. who found that 69% of patients admitted to not reading the consent form before signing it (N=265); 'Factors affecting quality of informed consent' (1993) 306 *BMJ* 885.

<sup>135</sup> D.W. Fitzgerald, et. al. 'Comprehension during informed consent in a less-developed country' (2002) 360(9342) *The Lancet* 1301.

<sup>136</sup> T. Mann, 'Informed Consent for Psychological Research: Do Subjects Comprehend Consent Forms and Understand their Rights?' (1994) 5(3) *Psychological Science* 140.



ensure that the patient has been properly informed about its risks and benefits.’<sup>137</sup>

Jackson contends that in neither case does the law adequately protect patients’ interests in making informed decisions nor provide remedies for when they are not. Instead, medical law’s emphasis on consent (and its precondition of knowledge) creates a ‘paternalistic model of medical decision making in which a doctor offers the patient one treatment option, which can then be accepted or declined.’<sup>138</sup>

These critiques of informed consent’s ability to ward off the dangers of paternalism echo those raised by Feinberg, Dworkin, and others as they struggled with preserving liberalism’s commitment to autonomy within socio-political contexts that constrain rather than foster free choice. It is in this way that the limits of consent can be defined by its preconditions such that an inadequate amount of information or a lack of reasonable alternatives can serve to vitiate the ‘moral magic’ of consent when situated as impediments to autonomous decision-making. Jackson alludes to these difficulties when rejecting the law of negligence as an appropriate avenue for the protection of patients’ autonomous interests given juridical determinations of the appropriate standard of care in non-disclosure cases. There, considerations of the ‘reasonable doctor’ and/or the ‘prudent patient’ are often not desirable given their reliance on customary standards and hypothetical contexts.

This same positioning of consent’s knowledge requirement within a sphere of normative standards can be seen in the criminal law context, particularly in assault cases that occur during sporting activities. A player’s participation in a sport is understood to be a form

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<sup>137</sup> E. Jackson, ‘Informed Consent and the Impotence of Tort’ in Sheila McLean (ed) *First Do No Harm: Law, Ethics, and Healthcare*. (Ashgate 2006), 273.

<sup>138</sup> Jackson (n 137), 279. This is akin to Wendy Brown’s argument that consent serves as a marker of ‘legitimate subordination’ (n 125). See *infra* text, pg. 54 for further discussion of this point.

of tacit consent to injuries that could reasonably be expected during the regular rules of play. Determining the parameters of what is ‘reasonable’ or ‘normal,’ however, is a daunting task. Courts have often taken judicial notice of behaviour and attitudes that fall outside the official rulebooks, taking into account unwritten codes of playing culture and attitudes. When dismissing an assault charge against a rugby player who had stomped on the head of an opposing player during a match, a Newcastle judge asserted she was ‘flabbergasted’ the Crown had pursued the case at all, dismissing the injury as ‘the sort that happens within the rough and tumble of a rugby match.’<sup>139</sup> This speaks to many of the issues raised in Chapter Four, where a survey of the consent defence in sporting contexts is conducted, highlighting how codes of hegemonic masculinity inform sporting activities and their culture. In these contexts, players are expected to learn “‘how things are done here” through unwritten rules/norms, expectations, shared values, role models, traditions, attitudes, reactions to incidents of violence, which they internalise from the moment they join that group.’<sup>140</sup> The player’s knowledge of these codes is a key component to the law’s assessment of whether an ‘implied sporting consent’ can be claimed.<sup>141</sup>

This same discourse of ‘unwritten rules’ is employed in consent discussions of sexual assault law, even accompanied in some cases with explicit ‘game playing’ language.<sup>142</sup>

While knowledge of and abidance with the often unstated ‘codes’ of (sexual) conduct are integral considerations of consent in sexual assault cases, in contrast to assaults

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<sup>139</sup> *R. v. Evans* (unreported) Crown Court (Newcastle), 14 June 2006; as cited in P. Stokes, ‘Judge throws out assault case over rugby player’s small bruise’ *The Telegraph*, 15 June 2006. UK case law often employs the terms ‘on-the-ball’ (rugby, football) or ‘off-the-puck’ (ice hockey) to describe incidents of violence which occur during the ordinary play of a game from those which exceed what could normally be expected among players. As Hartley observes, these on-the-ball incidents rarely come to trial and when they do, they can suffer critiques similar to the one offered by Judge Bolton in the *Evans* case: H. Hartley, *Sport, Physical Recreation, and the Law* (Routledge 2009), 109.

<sup>140</sup> Hartley (n 139), 114.

<sup>141</sup> This is explored in greater depth in Chapter Four.

<sup>142</sup> Archard (n 49), 8.

which take place on a sporting field, in sexual contexts these codes speak to the reasonableness of the assailant's belief in consent rather than the validity of the consent itself. This distinction is often explained in the literature with reference to the mental elements of the offence. The requisite *mens rea* of sexual assault requires that the assailant knew the victim was not consenting or, in the event of an honest but mistaken belief in consent, the establishment that this mistaken belief was reasonable.<sup>143</sup> The difficulty arises when these standards of reasonableness are established within frameworks that both rely on and propagate harmful stereotypes about male and female sexuality.<sup>144</sup> This was explicitly recognized by the Supreme Court of Canada in the sexual assault case, *Seaboyer* (1991) in the dissenting judgment offered by L'Heureux-Dubé J:

The woman who comes to the attention of the authorities has her victimization measured against the current rape mythologies, i.e. who she should be in order to be recognized as having been, in the eyes of the law, raped; who her attacker must be in order to be recognized, in the eyes of the law, as a potential rapist; and how injured she must be in order to be believed. If her victimization does not fit the myths, it is unlikely that an arrest will be made or a conviction obtained.<sup>145</sup>

Thus the reasonableness of an accused's belief in a sexual partner's consent is reliant on a set of unwritten rules about sexuality, communication, and gender codes which privilege certain subjects while prejudicing others. This is perhaps best evidenced in the case law addressing the defence of an honest but mistaken belief in consent where both

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<sup>143</sup> *R. v. Ewanchuk* (1998) 57 Alta. L. R. (3d) 235. There is also an allowance in both the British and Canadian jurisprudence for considerations of recklessness or 'culpable indifference' where it can be established that the accused was either unsure as to whether the complainant was consenting or, based on all the circumstances, *ought* to have known she wasn't. See: *B. v. D.P.P.* [2000] 1 All E.R. 833; and *R. v. Sansregret* [1985] 1 S.C.R. 570.

<sup>144</sup> Anastasia Powell speaks to this when she suggests that the law's treatment of sexual consent creates a circumstance where 'it is considered normal, even expected, that a woman would not be forthright in expressing sexual desire (so as not to appear unfeminine) and thus it is considered normal, even likely, that a man might misinterpret a woman's sexual signals'; *Sex, Power and Consent* (CUP 2010), 87.

<sup>145</sup> *R. v. Seaboyer*, [1991] 2 S.C.R. 577, 650-651.

English (*D.P.P. v. Morgan*)<sup>146</sup> and Canadian (*Pappajohn*)<sup>147</sup> courts have a history of upholding the mistake defence even where the accused's belief was not reasonable.<sup>148</sup>

Elizabeth Sheehy speaks to the inherent bias of this standard:

Men's stories can aspire to "reasonableness" not only because the women assaulted have been silenced by sleep, alcohol, drugs or some combination, but also because these stories tap into phallogentric beliefs. Such beliefs condition our willingness to disregard women's accounts of rape and to instead accept that their bodies have betrayed them, and that honest men, bewildered by what Carol Smart calls the unknowability of women's sexual desires and consistent with male pornographic imagination, have been seduced by unconscious women.<sup>149</sup>

Studies within the field of conversation analysis suggest ways in which hegemonic norms about male and female sexuality inform both judicial treatments of consent within sexual assault law as well as feminist advocacy projects which emphasise 'just say no' strategies.<sup>150</sup> Using comparisons with other forms of refusals found in day-to-day conversation, Kitzinger and Frith contend that 'it should not... be necessary for a woman to say "no" for her to be understood as refusing sex.'<sup>151</sup> Instead, these policies serve to cement and proliferate assumptions about the inherent 'nature' of women's lack of assertiveness and submissive sexuality. Further, these beliefs enter into the unwritten 'codes' which can inform an accused's honest but mistaken belief in consent. This suggests that approaches to consent in law which propose 'just say no' strategies do

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<sup>146</sup> [1976] AC 182.

<sup>147</sup> [1980] 2 S.C.R. 120.

<sup>148</sup> In Canada there have been some legislative attempts to remedy this (see s. 273.2 of the *Criminal Code*), although even these reforms are not without their critics: see E. Sheehy, *Sexual Assault in Canada: Law, Legal Practice & Women's Activism* (University of Ottawa Press 2012). Similarly, in the UK, the *Sexual Offences Act* suggests the reasonableness of the accused's belief should be assessed 'having regard to all the circumstances' (s. 4(2)). The maintenance of an unreasonable but mistaken belief in consent standard continues to be applied in other jurisdictions. For a comment on the relevant Australian jurisprudence, see: W. Larcombe, 'Worsnop v. The Queen: Subjective Belief in Consent Prevails (Again) in Victoria's Rape Law' (2011) 35(2) *Melbourne University Law Review* 697.

<sup>149</sup> Sheehy (n 148), 488. See also the 2011 Supreme Court of Canada case, *R. v. J.A.*, [2011] 2 S.C.R. 440, which overturns an appellate court's decision to issue an acquittal in a sexual assault case involving an unconscious complainant on the basis that she had previously consented to being choked into an unconscious state (as part of the couple's experimentation with erotic asphyxiation).

<sup>150</sup> C. Kitzinger and H. Frith, "'Just Say No?' The Use of Conversation Analysis in Developing a Feminist Perspective on Sexual Refusal' (1999) 10(3) *Discourse & Society* 293.

<sup>151</sup> Kitzinger & Frith (n 150), 294.

more to protect the rapist from criminal liability than they do for empowering women or remedying the harm of sexual assault – a critique that has been made of medical law’s use of informed consent as well with respect to protecting doctors from malpractice suits rather than increasing patient choice.<sup>152</sup> As Kitzinger and Frith note:

If there is an organized and normative way of doing indirect refusal which provides for culturally understood ways in which (for example) ‘maybe later’ means ‘no,’ then men who claim not to have understood an indirect refusal (as in ‘she didn’t actually say no’) are claiming to be cultural dopes, and playing rather disingenuously on how refusals are usually done and understood to be done. They are claiming not to understand perfectly normal conversational interaction, and to be ignorant of ways of expressing refusal which they themselves routinely use in other areas of their lives... [T]he root of the problem is not that men do not understand sexual refusals, but that they do not like them.<sup>153</sup>

One of the more interesting aspects to consent’s precondition of knowledge is the explicitness with which it demonstrates the epistemological hierarchy law employs when assessing the validity (or availability) of consent. Players, patients, and sex partners are required to know certain things in certain ways before their consent can be recognized in law. As has already been demonstrated, one of the primary delimiters of the ‘right way’ of knowing in consent configurations is a standard of reasonableness, which is grounded in the third precondition of consent: rationality.

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<sup>152</sup> See, for instance, Emily Jackson’s critique of the use of tort law in cases involving arguably inadequately informed consent (n 137). In the area of criminal law, Matthew Weait identifies a legal tension in consent’s role as the definitive element in the *actus reus* of sexual assault (i.e. to enhance or protect a person’s bodily integrity) and its role as a defence to the assault (where it vitiates liability). He argues that where consent is used as a defence, ‘the law protects a putative defendant from criminal liability not on the basis that no recognisable harm has been caused, but because of the context in which it has taken place. It follows that in such circumstances the law is not, at least *prima facie*, concerned with protecting, or indeed “enhancing” the autonomy of the person harmed, but rather with protecting the person who harms from the imposition of unjustified liability. Put simply, it is his autonomy (in the sense of his right to be free from unwarranted interference and condemnation by the state) that the law is concerned to protect.’ Interestingly, Weait identifies this tension in relation to the types of autonomy consent serves in each instance (thus, even in complicating the consent-as-autonomy story, his critique maintains it): M. Weait, ‘Knowledge, Autonomy, and Consent: *R. v. Konzani*’ (2005) October Issue *Criminal Law Review* 763, 768-769.

<sup>153</sup> Kitzinger & Frith (n 150), 310.

(iii) *rationality*

The law's interest in protecting the 'public interest' is a central engine in considerations of a consenter's rationality. Alluded to in the common law maxim *non consentit qui errat* (one who errs does not consent), forms of consent which lack sufficient cogency so as to liken themselves to mistakes or nonsense have not traditionally been considered valid. Amartya Sen suggests that this practice of public assessment is an integral component to reason, defining rationality as the 'discipline of subjecting one's choices – of actions as well as objectives, values, and priorities – to reasoned scrutiny'.<sup>154</sup>

Although often articulated in a form consistent with liberal political theory, considerations of rationality found in judicial treatments of consent are not simply matters of reasoned self-interest or preservation. Rather, stemming from an emphasis on self-rule, articulations of consent which prioritize rational exercises of will might best be characterised as explorations of autonomy. Sen, for instance, links rationality to freedom of thought, where rationality serves to recognise (and ideally) 'accommodate the diversity of reasons that may sensibly motivate choice'.<sup>155</sup> Yet law's interpretation of the scope of 'sensibly' creates a wide ambit from which many acts and desires are excluded.

In the criminal law context, this is perhaps most explicit in cases involving sadomasochistic activity. In the English case of *Brown* (1993), the court rejected the defence of consent of the defendants who had participated in sadomasochistic (homosexual) activity over a period of ten years.<sup>156</sup> The defendants' voluntariness was not in question (nor their knowledge of the activities in which they willingly engaged), but the defence of consent failed on the basis that 'the infliction of bodily harm without

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<sup>154</sup> A. Sen, *Rationality and Freedom* (Harvard University Press 2004), 4.

<sup>155</sup> Sen (n 154), 5.

<sup>156</sup> *Brown* (n 27).

good reason is unlawful,' rendering the consent of the victim immaterial.<sup>157</sup>

Determining the content of 'good reason' is largely a matter left to consent's precondition of rationality. Whereas the court was able to recognise the underlying rationale for such risk-associated and purposely harmful activities as tattooing, ritual circumcision, and violent sports, it viewed the sadomasochistic activity of the defendants as lacking in good reason and thus contrary to the 'public interest.'<sup>158</sup> Far less extreme cases exhibit the same approach. Judicial treatments of consent in any case involving a form of voluntary self-harm have emphasised the 'general principle' that interference with autonomy is justified only where a strong reason to do so exists, where language of the 'common good' or public interest is invoked to construct the content of this reason.<sup>159</sup>

In the medical law field, the articulation of consent's requirement of rationality is, at first glance, treated quite separately from concerns about public policy. The evaluation of one's rational decision-making abilities often rests on an assessment of whether undue influence has been exerted on the would-be consentor. Similar to the law's consideration of the external and internal aspects of voluntariness, the courts have sought to identify the leading influences on medical patients' consenting capacities. This has been articulated by the courts as an exercise in assessing the patient's 'strength

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<sup>157</sup> *Brown* (n 27), 16.

<sup>158</sup> Interestingly, the court in *Brown* relied upon the judgment in *R. v. Donovan* [1934] 2 KB 498 where Lord Lane equated 'good reason' with the public interest. Marianne Giles in her commentary on the *Brown* case suggests this amounts to requiring 'a court to in effect ask the same question twice'; M. Giles, 'R. v. Brown: Consensual Harm and the Public Interest' (1994) 57(1) *Modern Law Review* 101, 104.

<sup>159</sup> UK Commission Paper, (n 129), 11. Interesting to note is the discursive similarity between judicial treatments of 'irrational' acts conducted under the guise of (infelicitous) consent with articulations of the 'public interest' at stake in security measures which infringe upon fundamental freedoms. See, for instance, Peter Ramsay's work on Anti-Social Behaviour Orders and the re-articulation of 'public policy' as a discretionary power of the state to determine the components of a 'good way of life' (Lord Justice Glidewell in *Hughes v. Holley* (1988) 86 Cr. App. R. 130 at 139, as cited in P. Ramsay, 'Vulnerability, Sovereignty, and Police Power in the ASBO' in M. Dubber and M. Valverde (eds) *Police and the Liberal State* (Stanford University Press 2008) 164.

of will’ and the degrees to which it might be tempered by states of illness or pain or the presence of a ‘persuasive’ relationship – an approach which echoes the court’s attempts in *Brown* to negate the defendants’ consent through renderings of the activity involved as coerced or involuntary as a result of drug/alcohol use and the ‘undue influence’ of older participants.<sup>160</sup> Similar effects of negation on consent can be seen in cases involving religious objections to treatment. As Lord Donaldson MR in *Re T*<sup>161</sup> stated:

Persuasion based upon religious belief can also be much more compelling and the fact that arguments based upon religious beliefs are being deployed by someone in a very close relationship with the patient will give them added force and should alert the doctors to the possibility—no more—that the patient’s capacity or will to decide has been overborne. In other words the patient may not mean what he says.<sup>162</sup>

Some scholars have suggested that distinctions can be drawn between patient wishes which are ‘mere desires’ and those which can be thought sufficiently rational to signify consent.<sup>163</sup> While this view has led some to argue for a more structured format for assessing competency, others suggest that evaluations of a patient’s capacity are ‘often omitted if the patient’s decision “makes sense.”’<sup>164</sup> Similar to the epistemological hierarchy enacted in consent’s precondition of knowledge, the danger in such assessments of rational belief and action lies in their tendency to rely upon and further inscribe hegemonic belief systems. As Lori Beaman maintains in her examination of religious objections to medical treatment, the freedom to make decisions according to religious belief is restricted, in law, to ‘those religions that look like mainstream Christianity or are most familiar to many Canadians. Those beliefs and practices that lie

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<sup>160</sup> Giles (n 158), 107.

<sup>161</sup> [1993] Fam 95 C.A.

<sup>162</sup> As cited in Jackson (n 114), 281.

<sup>163</sup> See Julian Savulescu, ‘Rational Desires and the Limitation of Life-Sustaining Treatment’ (1994) 8 *Bioethics* 191, where he argues the decisions of Jehovah’s Witness’ to refuse blood transfusions are irrational on the basis that they are ‘mere desires’ rather than rational ones. See also Tom Beauchamp’s commentary on Savulescu (n 108), 62-63.

<sup>164</sup> A.S. Pomerantz, et. al. ‘Informed consent, competency, and the illusion of rationality’ (1991) 13(2) *General Hospital Psychiatry* 138, 138.



outside that hegemony are often constructed as harmful, or as potentially resulting in harm, and thus their limitation is justifiable.’<sup>165</sup> Thus law’s assessment of what behaviour might fall into excessive categories of ‘risk’ is mediated by consent’s precondition of rationality – itself constructed with shared understandings or common sense ‘community standards.’<sup>166</sup> Beaman suggests this point is well illustrated in the Canadian case, *B.H.*,<sup>167</sup> where the courts forced a 16-year old Jehovah’s Witness to undergo a blood transfusion, vitiating her consent (in part) on the basis of rationality. Provocatively, Beaman positions the court’s reasoning as an articulation of the ‘common sense’ position that ‘[a]nyone who is willing to risk death for her religious beliefs cannot be thinking rationally. Clearly, she has been unduly influenced, duped, brainwashed.’<sup>168</sup>

Although many of the difficulties stemming from the law’s use of public policy or ‘community standards’ arguments in its assessments of the reasonableness of a consent to injury or refusal of medical treatment has been amply reviewed in the literature,<sup>169</sup> what is often left unexamined is the contribution the consent-as-autonomy story makes to this framework. As Ackerman has argued within the context of medical law’s informed consent doctrine, autonomy is rooted in two fundamental beliefs about human

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<sup>165</sup> Beaman (n 64), 67.

<sup>166</sup> See *R. v. Butler* (n 64), a Canadian Supreme Court of Canada decision which decided the confines of obscenity on a ‘national community standard relat[ing] to harm not taste.’ Interestingly, Chapter Three explores how a similar framework was employed during the medieval period where consent served as an indicator of how well human appetites and desires were ‘balanced’ or moderated so as to avoid sinful excess.

<sup>167</sup> *H.(B.)* (n 41).

<sup>168</sup> Beaman (n 64), 91.

<sup>169</sup> Nicola Padfield surveys some of the UK case law on this matter in her article ‘Consent and the public interest’ (1992) 142 *New Law Journal* 430. See also Chapter Four’s discussion the defense of consent in sport for a review of some of these critiques (and consequences) of the ‘public policy’ objections to consent.

behaviour and cognition which stem from classical political liberalism.<sup>170</sup> One of these is the principle of non-interference. Autonomy is often thought to be best preserved when persons are ‘left alone’ to make their own choices.<sup>171</sup> In the medical ethics field, this has manifested as a doctrine of ‘non-interference’ within the doctor-patient relationship where after sufficient disclosure, patients’ choices and actions are their own. Ackerman’s own position on this model of non-interference is akin to that taken by many contemporary bioethicists who suggest that aside from ample discussion about disclosure procedures, very little attention is paid to the myriad of factors which can influence one’s ability to act autonomously, perhaps pre-eminently, illness.<sup>172</sup> Further, this principle assumes that patients are already autonomous in their decisions (when given the necessary conditions or opportunities) which pre-empts examinations of the ways that these decisions are made and the factors that can influence them. This has led many contemporary writers in the field to advocate for the ‘process model’ of obtaining consent, discussed earlier.<sup>173</sup>

A second tenet of classical liberalism that underlies dominant understandings of autonomous action is that agentic or autonomous human behaviour is that which is

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<sup>170</sup> T. F. Ackerman, ‘Medical Ethics and the Two Dogmas of Liberalism’ (1982) 5 *Theoretical Medicine* 69.

<sup>171</sup> This marks the distinction that some philosophers have made between ‘autonomy’ and ‘freedom,’ where the former is limited to forms and capacities of self-governance and the latter is meant to represent unconstrained action. See, for instance: Gerald Dworkin, *The Theory and Practice of Autonomy* (CUP 1988); John Christman, ‘Autonomy and Personal History’ (1991) 21(1) *Cdn J of Phil* 1; and also Christman’s ‘Constructing the Inner Citadel: Recent Work on Autonomy’ (1988) 99 *Ethics* 109.

<sup>172</sup> There are, however, many legal and bioethicist scholars who argue against the view that illness undermines one’s ability to act autonomously. See: S. MacLean, *Autonomy, Consent, and the Law* (Routledge 2010), 55; and Miller and Wertheimer (n 108) examples.

<sup>173</sup> For Ackerman this would mean a reconceptualization of patient autonomy from the ‘ready-made ability’ model to a ‘process of personal growth... a re-direction of conduct.’ This, he argues, helps to recognize the ways in which patients’ autonomous choices are made in conjunction with (or a result of) interactions they have with a health care professional. However, Ackerman maintains that the application of liberalism’s dogma of non-interference ‘to the therapeutic relationship denies this insight. It suggests that maximal exercise of autonomous behavior by patients is to be secured by establishing recognition of “choice rights” which assure non-interference in their efforts to deal with the disruptive effects of illness...The only proviso is that disclosure through informed consent be undertaken to fill the usual information gap,’ (n 170), 72-73.

governed by a plan or intended course of action that has been reached through a process of rational deliberation. For Ackerman, this deliberation entails an ‘investigation of the factual circumstances affecting the choice of goals and the means for achieving them, as well as the setting of preferences based upon such investigation.’<sup>174</sup> For these deliberations to be considered ‘rational,’ the investigation of the surrounding factual circumstances, the preferences an individual has within these circumstances, and the hierarchy or priority to which these preferences are assigned must conform in some meaningful way to dominant norms and preferences in similar circumstances. As Mele has argued, to be an autonomous agent one must be capable of *reliable* deliberation.<sup>175</sup> This reliability, then, is determined on the basis of whether the factors that have influenced a person’s decision are familiar, common, or ‘known’ to those judging the deliberation. This requirement of familiarity or reliability – as the differently pleased in *Brown* or the Jehovah’s Witnesses in *B.H.* know already – is of central importance to law, its notions of responsibility, and its limits. As Morse notes:

The law’s conception of the person as a practical reasoner is inevitable if one considers the nature of law. At base, law is a system of rules and standards expressed in language that are meant to guide human behaviour. The law therefore presupposes that people are capable of using rules and standards as premises in the practical syllogisms that guide action... The law’s concept of responsibility follows from its view of the person and the nature of law itself. Unless human beings are rational creatures who can understand the applicable rules and standards, and can conform to those legal requirements through intentional action, the law would be powerless to affect human behavior. Legally responsible agents are therefore people who have the general capacity to grasp and be guided by good reason in particular legal contexts. They must be capable of rational practical reasoning.<sup>176</sup>

A key component, then, to the precondition of rationality is an evaluation of how well reasoned or deliberated a particular decision has been. Further, an assessment of this

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<sup>174</sup> Ackerman (n 170), 70.

<sup>175</sup> Mele also adds the requirements of a certain degree of mental stability and self-control to the recipe for autonomy: A.R. Mele, ‘Agency and Mental Action’ (1997) 11 *Philosophical Perspectives* 231.

<sup>176</sup> S. J. Morse, ‘Rationality and Responsibility’ (2000) 74 *Southern California Law Review* 251, 252-253.

process of reasoning necessitates some knowledge and acceptance of the factors or ‘rules and standards’ used as ‘premises in the practical syllogisms’ that have guided one’s action (to employ Morse’s terminology). For law and, in particular, its delineation of who can and cannot consent, this requires an invocation of ‘common sense,’ given its noted familiarity and reliability – key elements of liberalism’s view of rational deliberation. This presents little difficulty to those subjects whose own beliefs and value systems (if not bodies, identities, and subjectivities) fall squarely within the familiar; however, for those whose beliefs or values are deemed too ‘strange,’ consent’s precondition of rationality will not be met.<sup>177</sup> These non-conformists are left, to employ the language of the House of Lords in *Brown*, with ‘no good reason.’

In some instances, being too far outside the realm of the ‘common’ renders a consideration of consent irrelevant from the onset, irrespective of whether it has met the necessary preconditions. This lends credence to MacLean’s observation that ‘for consent to have normative or justificatory force, it will have to be conceptually linked to other concepts, most importantly, to the concept of rationality.’<sup>178</sup> The promise of free will, liberty, and self-governance that consent is meant to signify and protect seems available for some people and practices but not others. Central to the production and maintenance of these governing norms of ‘good reason’ is the establishment of a ‘common sense’ – one that can privilege certain behaviours and subjectivities while obscuring alternative accounts of ways of being and acting in the world. This relationship between consent and the ‘sense we hold in common’ is explored in the following section.

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<sup>177</sup> For a discussion of how this characterisation of ‘strangeness’ functions in Canadian case law addressing indecency, obscenity, sexual deviance, polygamy, and freedom of religion (among minority religions), see: Jennifer Olijnyk, *A Question of Strangeness* (LLM Thesis, University of Toronto Faculty of Law 2010).

<sup>178</sup> D. MacLean (ed) *Values at Risk* (Rowman & Littlefield 1986), 17.

### Conceptualising the Common: Tacit Consent and Intelligibility

While writing about penal reform during the late eighteenth and early nineteenth centuries, Alan Norrie notes that many of the central notions of the Enlightenment which influenced the reform movement, such as free individualism, are ‘tempting simply to see... ahistorically, as part of the triumph of reason and progress in human affairs.’<sup>179</sup> In spite of a recognition that this ahistorical lens is the one most often employed by lawyers and legal theorists, Norrie maintains that historicising these concepts is an essential task for legal scholars given the ways in which they have ‘served important social interests and embodied particular ideological stances and strategies.’<sup>180</sup> An appreciation for these social relations is of particular importance when, as some critical legal scholars have argued, the relations are unequal and supported by embedded ideologies. In such circumstances, ‘the liberal emphasis on free individuals makes the theory itself the bearer of subordination.’<sup>181</sup>

Carole Pateman articulates this very position in her 1988 text, *The Sexual Contract*, where she contends that the social contract theory of classical liberalism both creates and relies on a fiction of property in the person. Although Pateman’s central concern throughout the text is with the civil subordination this fiction creates for women when control over their bodies is ‘contracted out’ to others via marriage, prostitution, and surrogacy agreements (among other social relationships governed by contract theory),

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<sup>179</sup> A. Norrie, *Crime, Reason, and History: A Critical Introduction to Criminal Law* (2<sup>nd</sup> edn, Butterworths 2001), 20.

<sup>180</sup> Norrie (n 179), 20. Norrie’s study is largely concerned with how these ideological positions become ‘embedded in the law itself,’ thus gaining a somewhat unquestionable status. In her own historical study of the notion of criminal responsibility in English law, Nicola Lacey notes the same pervasive influence of classical liberalism, suggesting that ‘the responsible subject of criminal law today is a certain kind of citizen, and a rational, self-determining moral agent’ which owes its roots to ‘a set of ideas about human being and a set of values which finds expression, variously, in the work of [Enlightenment] philosophers’: N. Lacey, ‘In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory’ (2001) 64(3) *Modern Law Review* 350, 357.

<sup>181</sup> Mansbridge (123), 27.

her critique is equally applicable to other circumstances where the consent-as-autonomy story operates amidst conditions of social inequality. Although contract is often heralded among liberal scholars as the ultimate symbol of freedom,<sup>182</sup> Pateman maintains that this subordination is dependent on the social context in which a contract is made.<sup>183</sup> In this way, Pateman draws a distinction between contract and consent on the basis that the former can create new relationships whereas the latter merely operates within a given frame of existing social relations. Wendy Brown has made a similar observation, suggesting that the liberal understanding of consent constructs a state of subservience rather than autonomy wherein one submits to terms that are not one's own; one acquiesces to the circumstances set by another. For Brown, this leaves consent to mark the boundaries of 'legitimate subordination.' Using the example of contemporary rape law, she elaborates:

If in rape law, men are seen to *do* sex while women *consent* to it, if the measure of rape is not whether a woman sought or desired sex but whether she acceded to it or refused it when it was pressed upon her, then consent operates both as a sign of subordination and a means of its legitimation. Consent is thus a response to power – it adds or withdraws legitimacy – but is not a mode of enacting or sharing in power. Moreover, since consent is obtained or registered rather than enacted, consent is always mediated by authority... and is thus both constituent of that authority and legitimated by it.<sup>184</sup>

Pateman makes a parallel contention within the context of employment contracts, where an employee's continued participation in the workplace is viewed as a form of agreement with its conditions, however unequal they might be. Pateman suggests '[i]t might be argued that, rather than giving consent, the individual assents or acquiesces to

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<sup>182</sup> Take, for example, Robert Nozick's position that voluntary slavery can be morally justifiable on the basis that it has been freely consented to: R. Nozick, *Anarchy, State, and Utopia* (Basic Books 1974), 331; or Richard Posner's contention that 'consensual enslavement' is a 'wealth-maximizing, voluntary, and thus moral sale of labor': R. West, 'Authority, Autonomy, and Choice: The role of consent in the moral and political visions of Franz Kafka and Richard Posner' (1985) 99 Harv. L.R. 384, 395; describing R. Posner, *The Economics of Justice* (Harvard University Press 1981).

<sup>183</sup> C. Pateman, 'Afterword' in O'Neill et. al. (n 86).

<sup>184</sup> Brown (n 125), 163.

the power structure, but this raises other equally familiar difficulties about tacit consent.<sup>185</sup>

Although Pateman herself doesn't tackle these 'familiar difficulties,' it seems safe to assume that at least one of them is tacit consent's necessary (and widely acknowledged) hypothetical character. As this chapter's earlier discussion of political theorists' battles with legal paternalism noted, consent's status as a political fiction is often attributed to a practical problem, i.e. the impossibility of obtaining actual consent in many cases. Yet what this kind of account overlooks is the role this fictional status has in establishing and entrenching the consent-as-autonomy story. In the first instance, attributing a 'common sense' to a group can serve homogeneous ends within a collection of persons who are likely never to know one another. This is acknowledged explicitly in the work of Benedict Anderson who has suggested the sense of socio-political belonging that is produced through invocations of a hypothetical or tacit consent can be characterized as an 'imagined community' given that 'the members of even the smallest nation will never know most of their fellow members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.'<sup>186</sup> Anderson focuses on how this sense of belonging forms the crux of how nation states are understood and actions in their name are carried out. Echoing some of the observations made by Pateman and others, Anderson notes that 'regardless of the actual inequality and exploitation that may prevail in each [community], the nation is always conceived as a deep, horizontal comradeship.'<sup>187</sup>

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<sup>185</sup> Pateman (n 183), 238-239.

<sup>186</sup> B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1983), 6.

<sup>187</sup> Anderson (n 186), 7.

This is something addressed directly by John Locke, to whom the concept of ‘tacit consent’ is attributed.<sup>188</sup> Of particular importance to the current inquiry is the link Locke himself makes between ‘common’ or familiar understandings and tacit consent. Locke positions tacit consent as the means by which government gains legitimacy over the natural freedom all persons are presumed to have.<sup>189</sup> Akin to more contemporary scholars’ struggles with legal paternalism explored at this chapter’s outset, Locke notes the impossibility for this consent to be anything other than hypothetical, thus necessitating the presumptive or unspoken consent of all citizens. While most readers of Locke’s work suggest that this tacit consent marks the formation of the social contract, Anili reinterprets Locke’s notion of tacit consent in light of the empiricist views he expressed in *An Essay Concerning Human Understanding* (1690), wherein Locke pursues questions about how human beings come to know and understand the world around them.<sup>190</sup> This work provides insight into Locke’s own epistemological stance, one deeply rooted in the Christian medieval world.<sup>191</sup> Regarding the human mind as a blank slate, Locke maintained that knowledge was gained through sensory and

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<sup>188</sup> Locke is a useful figure to examine for a number of reasons, the first of which is the period in which he was writing and the influence his work has had on the development of both liberal theory and its concept of consent. Further, the critiques his work has garnered and the continued relevance his writings have had in the contemporary fields of law, politics, and consent theory situate Locke as a pivotal figure. Bruno Anili puts the point in the following way: ‘While other thinkers, ranging from Hobbes to Montesquieu, from Adam Smith to the French *philosophes* certainly participated in shaping the early phases of the complex political project that was to be called liberal, it may legitimately be argued that Locke’s system of thinking is the central knot in that web of contributions’; B. Anili, *Beyond Liberal Discourse: Meta-Ideological Hegemony and Narrative Alternatives* (PhD Dissertation, University of Oregon 2010), 71.

<sup>189</sup> This is an argument repeated even among contemporary critics of liberalism. The Wendy Brown excerpt cited above (n 184) imbues consent with the same magical power to ‘add or withdraw legitimacy.’

<sup>190</sup> Anili (n188).

<sup>191</sup> While somewhat anecdotal, Locke’s own medical training and education (which were undertaken in the eve of the medieval period) suggest a further relevance (within this study) of considering the influence of his work on contemporary understandings of consent, given the upcoming chapter on medieval medicine. For some discussion of Locke’s personal history and circumstances and the (potential) impact they can be seen to have had on his written works, see: D. Walsh, ‘Locke’ in Kenneth L. Deutsch and Joseph R. Fornieri (eds) *An Invitation to Political Thought* (Thomson 2000).



reflective experience.<sup>192</sup> Further, Locke viewed words as merely signifiers of these external experiences<sup>193</sup> and these signifiers themselves as being, in the first instance, subjective. ‘Words,’ Locke writes, ‘in their primary or immediate signification, stand for nothing but the ideas in the mind of him who uses them, how imperfectly soever or carelessly those ideas are collected from the things which they are supposed to represent.’<sup>194</sup>

This relationship between words and their subjective meanings raises a problem for Locke not unlike the one pursued by Thomas Aquinas with respect to the unknowable nature of another’s internal will.<sup>195</sup> If words are merely the marker of ideas within the minds of individuals, how can anyone be assured that the same meanings have been ascribed to the same words in the minds of others?<sup>196</sup> Locke is clear that the ability to impose shared meanings is an epistemological (if not political) power that no individual, not even ‘the great Augustus himself’ possesses.<sup>197</sup> Instead, these shared meanings can be nothing more than approximations that are established as a familiarity with words and their associated meanings is gained among a community – a process that occurs,

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<sup>192</sup> ‘Though the qualities that affect our senses are, in the things themselves, so united and blended, that there is no separation, no distance between them; yet it is plain, the ideas they produce in the mind enter by the senses simple and unmixed’; J. Locke, *Essay*, Book II, Chap. II, §1: ‘Uncompounded Appearances’ as cited in Anili (n 188), 83.

<sup>193</sup> Anili uses the example of the word “hot” used to signify the sensory experience of touching a heated object (n 188), 84.

<sup>194</sup> *Essay*, Book III, Chap. II, §2 (at p. 267 of Kay and Troutman edition); as cited by Anili (n 188), 84.

<sup>195</sup> Aquinas’ own struggles with consent and the difficulty of assessing its authenticity are examined in greater detail in Chapter Three.

<sup>196</sup> Locke presents the difficulty as two-fold: ‘First, They suppose their words to be marks of the ideas in the minds also of other men, with whom they communicate: for else they should talk in vain, and could not be understood, if the sounds they applied to one idea were such as by the hearer were applied to another, which is to speak two languages... Secondly, Because men would not be thought to talk barely of their own imagination, but of things as really they are; therefore they often suppose the words to stand also for the reality of things’ (*Essay*, Bk III, C.II, §4); as cited by Anili (n 188), 85.

<sup>197</sup> ‘No one hath the power to make others have the same ideas in their minds that he has, when they use the same words that he does. And therefore the great Augustus himself, in the possession of that power which ruled the world, acknowledged he could not make a new Latin word: which was as much as to say, that he could not arbitrarily appoint what idea any sound should be a sign of, in the mouths and common language of his subjects’ (*Essay*, Book III, chap. II, ‘Of the Signification of Words,’ §8).

according to Locke, through common use. Moreover, this common use is granted an epistemological authority via tacit consent, for as Locke explains, as ‘certain sounds to certain ideas’ gain common appropriation, the ‘signification of that sound’ becomes limited such that ‘unless a man applies it to the same idea, he does not speak properly: and let me add, that unless a man's words excite the same ideas in the hearer which he makes them stand for in speaking, he does not speak intelligibly.’<sup>198</sup> Anili characterizes this use of tacit consent as a semiotic contract, given its role in producing the ‘conditions for communication’ – an operation which he likens to the social contract on the basis that each ‘rests on the agreement of individuals, and on the power of community to enforce it.’<sup>199</sup> While this articulation relies heavily on the liberal story of consent (i.e. as an autonomous choice or agreement to the terms of political authority), Anili’s characterisation of Lockean individualism as ‘semiotic’ is a useful insight. Locke himself identifies the role a shared language or system of signs plays in the construction and maintenance of schemes of intelligibility. He reminds us, in the passage quoted above, that one must use the words shared ‘in common’ to ‘speak properly’ in order to be understood. Further, the use of these words and their shared meanings marks one as a member of the community. Not unlike Hegel’s notion of reciprocal recognition, to be an intelligible person, one must be seen or understood as such (by other recognisably intelligible persons). This requires the use of the common language, something which for Locke was understood as (tacit) consent – the mark of community membership.<sup>200</sup>

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<sup>198</sup> *Essay*, Book III, chap. II, ‘Of the Signification of Words,’ §8.

<sup>199</sup> Anili (n 188), 86.

<sup>200</sup> This function of consent (to signify socio-cultural belonging) is evidenced in the legal regulation of sex in Ancient Greece and Rome. This is explored at length in the following chapter.

This points to one of two ways in which the fictional status of consent serves to entrench the consent-as-autonomy story. Through invocations of a ‘common sense’ that prioritizes autonomy, the frames of intelligibility of consent are established so as to prevent the possibility of thinking of it in any other way. Within the context of contemporary treatments of consent, these might be thought of as the ‘unwritten codes’ that establish the parameters of ‘good reason’ or the ‘common good.’ If one steps too far off the beaten path, violating these normative codes, one’s actions become unintelligible. They lack ‘good reason’ or demonstrate an inability to ‘speak properly,’ as Locke might suggest.<sup>201</sup> This demonstrates how these structures of normative grammar or frames of intelligibility contain a coercive element, compelling speakers or subjects to adopt dominant discursive practices as their own (or risk not being understood). Consent thus becomes the means by which a subject’s intelligibility is both produced and enforced and must therefore be understood in conjunction with (rather than in opposition to) coercion.<sup>202</sup> The power to establish a ‘common sense’ or to set the frames of intelligibility is the power to establish and define communities and the subjects who live within them.<sup>203</sup>

This creates a conundrum of considerable social and political consequence when consent is the means by which members of certain groups are not merely excluded from intelligibility but are held to have agreed to the terms which make this exclusion

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<sup>201</sup> This unintelligible actor can be thought of as a Gramscian ‘idiot’ – a term he employs in reference to the Greek word, *idios*, meaning ‘individual’ or ‘one’s own’ (i.e. idiosyncratic), in reference to speech patterns that are too individualistic, too much ‘one’s own’ to be understood; A. Gramsci, *Selections from Cultural Writings*, D. Forgacs and G. Nowell Smith, ed (Harvard University Press 1985), 124.

<sup>202</sup> This is what lies at the core of Gramsci’s concept of hegemony, described as ‘a theory of the organization of consent’ by Peter Ives, *Language and Hegemony in Gramsci* (Fernwood 2004), 64.

<sup>203</sup> In this way, consent can be understood to operate as an onto-epistemology (to employ a term coined by Karen Barad), where it sets the terms for what can be known, in what ways, and how this knowledge, in turn, constitutes how subjects are understood (both by themselves and others); K. Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke Univ. Press 2007).

compulsory. This speaks to the second way in which consent's hypothetical character serves to entrench the autonomy story. Tacit consent is often positioned as a substitute for an impossible experience; it is a fiction meant to stand in for an unlived reality. This is what Jeremy Webber has argued is the 'trope' of consent, where it is imputed to members of a political community on one of three bases: that it represents what citizens *could* consent to (thus examining the limits of what constitutes 'legitimate' state action); that it represents what citizens *should* consent to (thereby invoking the issue of rights and correlative duties); or that it represents what citizens *would* consent to (if only it were possible to ask them).<sup>204</sup> Consent thus functions as an acceptable substitution only if its imaginary form contains the fiction of its realisability. In other words, consent – to be operable as an adherent of political community – must be unreal (i.e. hypothetical) while not being so unreal as to be unimaginable (and thus ineffective). This is particularly important when, as Anderson notes above, the imagined community consent is meant to produce and hold together is not homogenous but rather rife with inequality.

Difference, while *prima facie* threatening to the imagined homogeneity of the community, is an integral component of its constitution and is often the basis for differential or unequal treatment of its members.<sup>205</sup> This is not simply because of the role of the 'other' in constructing a shared (if imagined) identity – although this, too, is part of the work of consent's autonomy story. Rather, one might argue (as Judith Butler does with respect to pornography), that the fiction of consent 'depicts impossible and uninhabitable positions, compensatory fantasies that continually reproduce a rift

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<sup>204</sup> J. Webber, 'The Meanings of Consent' in J. Webber and C. M. MacLeod (eds) *Between Consenting Peoples: Political Community and the Meaning of Consent* (UBC Press 2010), 9-10.

<sup>205</sup> This is in keeping with Arendt's argument that the nation state must produce an exilic population to beget and preserve the homogenous citizen: H. Arendt, *Origins of Totalitarianism* (Harcourt & Brace 1979).

between those positions and the ones that belong to the domain of social reality.’<sup>206</sup>

This rift is a necessary one – not because of the inequality or subordination that it reveals, but because of the ideal of autonomy that it preserves, the vision that if we can only ‘get it right,’ consent will deliver self-actualisation, self-determination, and bodily integrity. Provided that the autonomy that consent promises remains unrealizable, it can continue to hold sway. It is able to house a vision of what could be, even in the face of what we know isn’t.<sup>207</sup>

This creates an imperative to move beyond the notion of consent as merely an illusion, to an understanding of it as something more operative. Not only does the story of autonomy that is told about consent obscure the social realities of inequality, difference, and subordination that might threaten a notion of the homogenous citizenry (and thus, governmental action made in its name), but it also conceals the historically specific conditions of existence which have brought consent’s ‘common sense’ into being. It is an ‘invocation of a nonhistorical “before”... that guarantees a presocial ontology of persons who freely consent to be governed, and thereby, constitute the legitimacy of the social contract.’<sup>208</sup> The production of this presocial ontology is the key to understanding how consent has continued to play an integral role in the establishment of political community, state legitimacy, and corporeal governance despite explicit recognition of its fictional and paradoxical promise of autonomy.

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<sup>206</sup> J. Butler, *Excitable Speech* (Routledge 1997), 68.

<sup>207</sup> This is well evidenced by the practice among some scholars to employ what I think of as a ‘retroactive reading’ of consent, positioning it as a form of autonomy even within socio-political contexts that don’t allow for this contemporary understanding. This can be seen in the following chapter where twenty-first century scholars have remarked on the presence of female consent (as autonomy) in the context of sexual relationships in Antiquity, despite women lacking the necessary socio-political status at the time for such an act of self-governance or freedom to be possible.

<sup>208</sup> Butler (n 11), 5.

## Conclusion

This chapter has surveyed what might be thought of as the ‘canon’ of contemporary consent law. Despite performing a multitude of functions across diverse areas of law, there is a common underlying story of autonomy that is told about consent. Moreover, this story is awarded a ‘common sense’ status in consent theorising, to the exclusion of all other narratives. This represents something of a paradox in how consent is understood both in legal theory and practice. Although claims of its ‘shifting content’ or ambiguous meaning are commonplace, legal treatments of consent in both medical law and criminal contexts take place against a backdrop of this ‘common sense’ story. Understanding consent as an enactment of personal autonomy or means of self-governance is what ‘everybody knows’ consent means. A review of how courts in Canada and the United Kingdom assess the availability of consent reveals it is a ‘freedom’ that has pre-requisites, each of which serve to allow consent in some contexts (and for some subjects) while prohibiting it in and for others. Further, these preconditions of voluntariness, knowledge, and rationality are defined in accordance with this common sense story of autonomy. Where subjects attempt to consent in contexts that don’t conform to this narrative, the law does not recognize the consent as valid (or autonomous). Instead, these acts and subjects are rendered ‘irrational’ or lacking in ‘good reason’ for their failure to conform to this dominant story of autonomy.

This lends an unquestionable status to the consent-as-autonomy story, creating a need to ‘unhook’ consent from this common sense narrative in order to understand the social, cultural, and political conditions which have made this view of consent possible and, indeed, necessary in contemporary determinations of the limits of self-rule. This thesis aims to address this imperative by treating consent as a human artefact, steeped in

historically located ideologies, with significant implications for subjectivity. The following chapters attempt to track consent as it travels through some of these locations, each involving social relations that differ greatly from those in which consent operates today, in the hopes of uncovering uses and functions that both differ from and challenge the consent-as-autonomy story.

## CHAPTER TWO – ANCIENT SEX

We don't know what consent *would* look like because 'it' hasn't existed in ideal form and therefore hasn't existed at all. But consent *has* looked like and *does* look like what it has been socially interpreted and conceived to be.. [C]onsent is always an interpreted idea, not an idealised abstraction... [and] casting consent as a nonexistent ideal (what *would* it look like?) because it has yet to be developed according to feminist values seems to erase the rich and perhaps illustrative history of the idea as a social and not a philosophical artifact.<sup>209</sup>

### Introduction

The study of the legal regulation of sex has been inextricably bound to the concept of consent. Certainly much legal scholarship would lend itself to the assumption that consent has pre-existed rape. Its absence marks the presence of sexual violence. This chapter aims to approach sexual consent differently, positioning it as an historical artefact rather than a concept with a priori status. In an attempt to move beyond discursive patterns in consent jurisprudence which foreground, if not privilege, the story of autonomy, this chapter proposes an examination of sexual offence legislation in the Classical period in Athens and Rome. The influence of both ancient Athenian and Roman law within Continental Europe and North America has been well documented.<sup>210</sup> While the contemporary relevance of this early jurisprudence is always subject to debate given the scarcity of sources, contentious (mis)representations of rhetoric, and the difficulties associated with interpretation and translation, some have argued that the 'problem' of, in particular, Athenian *nomos* – the wide assemblage of statutes, ordinances, and customs that are thought to make up early Greek 'law' – is, in fact, its greatest attribute.<sup>211</sup> This case is arguably made stronger when a genealogical

<sup>209</sup> Haag (n 17), xv (emphasis in original).

<sup>210</sup> See S. C. Todd and P.C. Millett, *Nomos: Essays in Athenian law, politics, and society* (CUP 1990), particularly Chapter #1, 'Law, society and Athens.'

<sup>211</sup> Todd & Millett (n 210).



approach to law is taken. Given the primacy which Athenian legal discussions and rhetoric placed on social attitudes and political contexts, this wide jurisprudential field can only aid an examination of a matter as socially and politically charged as the legal regulation of sex.<sup>212</sup> Further, the challenge of destabilising the foundations of sexual consent discourse is perhaps lessened amidst a narrative of socio-sexual relations in which notions of female agency do not figure in familiar forms.

Aside from examining the ancient period for an account of consent that differs from the autonomy story, this chapter is aimed at understanding how contemporary uses of consent in legal treatments of sexuality both rely upon and call to presumptions of this history. It is meant to be, to employ Foucault's term, a 'history of the present' to determine how what is 'known' about sexual consent and its origins has been necessitated by the circumstances in which these knowledges were produced.<sup>213</sup> What are the 'conditions of possibility' of what we know about sexual consent? How did the social and political context of ancient Greece and Rome frame (and place limits upon) this knowledge? And how might these early constructions help to illuminate modern debates among theorists of consent and their critics? As David Halperin has remarked:

[T]he Greeks are hardly alien or lost to us. They are, on the contrary, all about us – not because we are (allegedly) their inheritors, not because we may expect to find vestiges of them buried within ourselves, faintly discernible beneath layers of historical encrustation, transformation, and displacement. Rather, the Greeks are all about us insofar as they represent one of the codes in which we transact our own cultural business: we use our 'truths' about the Greeks to explain ourselves to ourselves and to construct our own experiences, including our sexual experiences.<sup>214</sup>

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<sup>212</sup> Although it should be noted that the manner in which the ancients may have legally regulated their sexual relations is not the primary matter under examination but rather the role that consent can be seen to have played in this context.

<sup>213</sup> M. Foucault, *Discipline & Punish: The birth of the prison* (Sheridan, tr, Pantheon Book 1977), 31.

<sup>214</sup> Halperin (n 69), 70.

Much the same could be said about the influence of Roman law and social custom on contemporary understandings of political life, culture, and subjectivity, if not more forcefully.<sup>215</sup> Indeed, while much of the Athenian approach to sexual offences persisted within Roman legislation, some divergences (later influenced by the development of Christian thought) exist. The first of three substantive sections of this chapter will attempt to reflect this pattern, beginning with an examination of the core Athenian practices which inform the notion of consent and incorporating Roman adaptations of and divergences from the Greek approach in later sub-sections that review both Athenian and Roman approaches to offences of (sexual) violence and adultery. This first section's delineation of early attempts to codify social norms about sexual behaviour, seen most starkly in the legislation of Augustan's moral reform in Rome at the turn of the first century, will focus on the proprietary and patrilineal interests sexual offence legislation was meant to protect. The role sexual consent can be seen to play in protecting these interests is also discussed using a construction I refer to as 'consent-as-propriety,' which highlights the function consent played in signifying political status and protecting its parameters. The second section examines an alternative story about consent as enacted among those members of early Athenian and Roman societies who were excluded from socio-political status, namely women, slaves, foreigners, and various 'sexual transgressors.' While it is tempting to characterize the actions among this group as 'autonomous' (in keeping with modern articulations of consent), when viewed within the context of the Classical period, these acts are not intelligible either as enactments of agency or of consent. Rather, what the sexual behaviours of this group of ancient outcasts reveals is not a story of consent-as-autonomy, but an account of the

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<sup>215</sup> Ibbetson and Lewis, for instance, suggest that the 'intellectual methodology' of the Romans (itself a remnant of the analytic modes of Greece's Classical jurists) was the foundational component to Rome's legal tradition and its continuing influence on contemporary forms of analytic jurisprudence: D.J. Ibbetson and A.D.E. Lewis, *The Roman Law Tradition* (CUP 1994).

way in which the availability and deployment of consent is restricted and governed by dominant norms of intelligibility. This snapshot of early Athenian and Roman law reveals that consent was available only to certain subjects who were willing to act in certain ways. How this ancient story of consent can be seen to inform the doctrine's contemporary uses is explored in this chapter's third section.

In this way, this chapter might be seen to echo the theoretical approach of Benjamin Constant where 'Ancient' and 'Modern' models of liberty were explored with the aim of better understanding a present state of affairs.<sup>216</sup> My own exploration of ancient and modern forms of consent is rooted in a contention that both the 'consent of the ancients' and the 'consent of the moderns' invoke particular models of ownership, whether of others (in the case of the ancients) or of the self (in the case of the moderns). Yet in contrast to Constant, I have approached these models as artefacts, viewing consent (as autonomy) as a relatively modern construction which is 'found' by scholars in their investigations of earlier eras.<sup>217</sup> These discoveries thus engage in a liberal grammar of self-governance and possessive individualism characteristic of modern conceptions of consent-as-autonomy. Reading these constructions within a historical context which explicitly denied notions of self-rule on the basis of political status provides an opportunity to destabilise this foundational discourse and contemplate an untold story of consent. The implications of this alternative narrative are explored in this chapter's conclusion.

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<sup>216</sup> B. Constant 'The Liberty of the Ancients Compared with that of the Moderns (1833)' in David Boaz (ed), *The Libertarian Reader* (Free Press 1997).

<sup>217</sup> Take, for instance, the work of Cohen (n 79), Moses (n 79), and Laiou (n 79), each of whom discuss the notion of 'female consent' to sex or marriage in Athens, Rome, and Byzantine (respectively) as a form of agency, despite explicitly noting women's lack of social, political, and legal status in each era. This disjuncture between persons exhibiting autonomy in socio-political contexts which did not recognize their personhood but rather treated them as property to be exchanged is left unexamined. The work of Rosanna Omitowaju stands as an exemplary exception to this pattern: R. Omitowaju, *Rape and the politics of consent in classical Athens* (CUP 2002).

### Ancient Approaches: Consent-as-Proprietorship

Issues of consent figure most prominently in Athenian law in the designation and prohibition of ‘illicit’ or transgressive sexual behaviour. Sexual offences were addressed under three primary categories, namely: (i) *hubris*; (ii) *bia*; and (iii) *moicheia*, each of which is examined in further detail below.<sup>218</sup> Roman legal developments in this area were largely subsumed under the single category of *stuprum*, understood to refer to ‘illicit sexual intercourse in any form.’<sup>219</sup> While largely understood to refer to adulterous behaviour, *stuprum* could also include instances of forcible sex. At times, this was made explicit in the language, for instance when combined with the term *raptus* (understood to mean ‘forcible abduction’); however, *stuprum* is also found to have been used on its own to refer to violent sexual behaviour as well as consensual sex. As such, the Roman treatment of sexual consent is addressed in the second and third sub-sections below where the greatest overlap in the two jurisdictions’ treatment of sexual offences occurs.

In each of these legal classifications, consent was a power limited to those members of the polis who enjoyed full rights of citizenship (i.e. free, Athenian-born men) and its enactment was a signifier of this status of political membership. In particular, consent served to represent a model of patriarchal rule and was employed as a means of protecting patrilineal interests and proprietary control over female sexuality. Where consent appears in circumstances that challenge this paradigm, it is treated as an aggravating factor to the sexual offence (rather than a means of vitiating a wrong, as in the contemporary context). Moreover, in such instances, consent did not establish a

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<sup>218</sup> I am indebted to Omitowoju’s (n 217) delineation of these categories.

<sup>219</sup> Moses (n 79), citing C.T. Lewis and C. Short, *A Latin Dictionary* (OUP 1879).

subject's autonomy, but rather served to remove the political status upon which such rights to self-rule were found. The following sub-sections explore this in further depth within each of the three forms of sexual offences of the period.

(i) *hubris*

Perhaps indicative of the 'extra legal' character of Athenian juridical practice, the offence of *hubris* has been noted by some scholars of ancient history to represent something of a paradox.<sup>220</sup> Despite the prominence the concept is thought to have had in daily Athenian life, there are few recorded cases of *hubris* having been brought to the courts. One explanation for this may lie in the nature of the offence itself. Loosely interpreted to mean 'shame,' the text of the law as existent in the fourth century reads:

If anyone commits *hubris* against another, whether child or woman or man, whether free or slave, or if he does anything outrageous (*paranomon*) against any of these, let any one who wishes (*ho boulomenos*), of those Athenians who are entitled, bring an indictment (*graphē*) before the judges (*thesmothetai*).<sup>221</sup>

Understood to be an act of power used to shame another for pleasure,<sup>222</sup> the party bringing the charge or *graphē* has allegedly suffered some dishonour from the perpetrator's act and presumably might wish to avoid the publicity of a formal trial.<sup>223</sup> Further, *hubris* also pertained to 'degrading acts' which were thought to bring shame upon the citizenry as a whole.<sup>224</sup> This was particularly the case in charges of *hubris* which involved a sexual act, although the *graphē hubris* could encompass a wide array

<sup>220</sup> N. Fisher, *Hybris: A Study in the Values of Honour and Shame in Ancient Greece* (Aris & Phillips 1992).

<sup>221</sup> Dem. XXI.47, as cited in Fisher (n 220), 123.

<sup>222</sup> Fisher, in what is considered by many to be the authoritative text on *hubris*, defines the offence as 'deliberate activity [with] the typical motive for such infliction of dishonour [being] the pleasure of expressing a sense of superiority, rather than compulsion, need or desire for wealth,' (n 220), 1.

<sup>223</sup> Omitowaju (n 217).

<sup>224</sup> This is similar to contemporary judicial treatments of cases involving sado-masochism or obscenity offences, where a 'community standards test' is employed as a means of ascertaining the parameters of acceptable conduct. See, for example, the Canadian case of *R. v. Butler* (n 64) and the English case of *R. v. Brown* (n 27).

of actions, including verbal assault, and need not involve an element of violence.

Instead, the central component of the offence was a subjective one: did the perpetrator intend to shame? Often, the coercive element of the offence could be implied by the respective social positions of the parties.<sup>225</sup> Cohen notes the work of Xenophon and his description of a ‘tyrant’s dilemma’ where Hiero, a ruler, desires the affections of Dailochus, a young male, yet to seek favour from him would be to endanger a charge of *hubris*, given his implicit power to compel obedience (for his own pleasure).<sup>226</sup>

Arguably, consent can be seen to play a key role in the charge of *hubris* given that its absence would suggest domination over another’s free will, thus causing dishonour.<sup>227</sup> Within the context of sexual assault, however, the *graphē hubris* was available to the ‘outraged fathers, husbands or brothers’ whose consent had not been sought before sexual access to the women in their care was obtained.<sup>228</sup> Coupled with the acknowledgment that a charge of *hubris* need not involve physical violence, some scholars have suggested that adultery would also have fallen within the offence’s scope. As Fisher notes, ‘it is clearly a deliberate act, involving pleasure for the agent, shame for the various victims, and consequently contempt for the laws and the values of a community.’<sup>229</sup> Cohen cites Lysias’ *On the Murder of Eratosthenes* as evidence of this

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<sup>225</sup> The same presumption is made explicit in most contemporary sexual assault law definitions of consent where an offender’s position of trust or authority will vitiate the possibility of the victim’s consent. See, for example, s. 273.1(2)(c) of Canada’s *Criminal Code* and s. 16(2) of the UK’s *Sexual Offences Act*, 2003.

<sup>226</sup> Cohen also cites Aristotle’s, *Politics* 1315a15-28, Isocrates’, *Nicocles* 36.5, and Demosthenes 17.4 as making the same claim with respect to a ruler’s sexual abuse of children (without the consent of their *kurios*); 1993 (n 79), 8.

<sup>227</sup> This is certainly Cohen’s view and one endorsed by other sources which reference his scholarship on the matter, see Cohen (n 79).

<sup>228</sup> Fisher (n 220), 41. The inclusion of *ho boulomenos* or ‘anyone who wishes’ within the *hubris* statute suggests other members of the Athenian public could bring the charge, provided they had legal standing which women, children, and slaves did not. Gardner notes that for Roman women, the consent of a tutor (similar to the Greek role of *kurios*) was required for obtaining standing for bringing a lawsuit given the effects it would have on the family if the suit was unsuccessful: J. Gardner, *Being a Roman Citizen* (Routledge 1993), 100.

<sup>229</sup> Fisher (n 220), 104.

when Euphiletus raises the defence of justifiable homicide on the basis of *hubris* for having murdered Eratosthenes following his (consensual) seduction and sexual relations with Euphiletus' wife.<sup>230</sup> Rather than being immaterial, the evidence of the wife's consent serves to establish the grounds for a charge of *hubris* given the dishonour the act brings to Euphiletus' house and children. In this way, consent does not vitiate the harm of a sexual offence but rather establishes it. The shame of the offence is made out through the consent of Euphiletus' wife, echoing a concern with familial lineage, rather than physical integrity or female autonomy.<sup>231</sup> Consensual extra-marital sex could result in uncertainty about a child's legitimate rights to inheritance and social status, thus its very invocation brought the property rights and obligations of the 'injured' male citizen to the fore.

The offence of *hubris* could also be employed to enforce attitudes towards appropriate age requirements for sexual behaviour. While some remnants of what cultural anthropologists have suggested was a 'familial' or 'tribal' approach to linking sexual age with puberty are evident in so-called Athenian 'age-of-consent' mores, this was largely limited to female citizens and based on concerns of (successful) reproduction.<sup>232</sup> In this respect, these 'age of consent' parameters might better be described as 'age of marriage' or 'age of access' norms given that it was the consent of the woman's father, husband, or *kurios* (i.e. legal guardian) which determined a man's access to her in both

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<sup>230</sup> Lysias suggests Euphiletus relies upon a law 'from the pillar on the Areopagus' which is thought to be the same as the law on justifiable homicide found in Demosthenes 23.53, allowing a husband to kill a man he found committing adultery with his wife; Cohen, 1991 (n 79). Omitowoju offers an alternative analysis of this claim which effectively counters much of the accepted scholarship on this point; (n 217), Chapter 3, in particular. A similar law is also found in Plato, *Laws*, Book 9, s. 874c; see: R.G. Bury (tr), *Plato in Twelve Volumes* (Harvard University Press 1968).

<sup>231</sup> Although Pamela Haag has offered an excellent analysis of postbellum treatments of consent in seduction cases in 19<sup>th</sup> and 20<sup>th</sup> century America, suggesting 'chastity' served as a form of labour; (n 17), in particular: Ch #1, 'Chastity is Only Good for the Work it Can Do: Seduction, consent, and the private self.'

<sup>232</sup> V. Bullough, 'Age of Consent' (2005) 16(2) *Journal of Psychology and Human Sexuality* 25.

Athens and Rome (rather than some level of sexual independence that reaching a certain age might bring).<sup>233</sup>

Where age and consent met more substantively in Athens was in the practice of *paederasty*, a homoerotic mentoring relationship between older Greek men and boys between the ages of twelve and eighteen (or earlier if signs of ‘manhood,’ e.g. beard growth, emerged).<sup>234</sup> While often represented in contemporary analyses as examples of accepted homosexuality, the relations between adult Greek men and their adolescent citizens-in-training were subject to a number of limitations that differentiate them from contemporary understandings and forms of homosexual love.<sup>235</sup> The paederastic relationship was understood to be one of ‘friendship, virtue, and pedagogy’ and did not extend beyond the youth’s adolescence.<sup>236</sup> Paederastic practices are a good site for exploring alternative conceptions of consent given that sex was not understood to be a reciprocal transaction in Classical Greece but rather an act which was done *by one to* another, creating active and passive roles.<sup>237</sup> The Greek sexual ‘actor’ was regarded as having a penetrative and dominant role, necessitating a passive and recipient role for the other party. As such, sex played both a hierarchical and polarizing role in Greek society, where free, full rights-bearing Greek (male) citizens could only engage in sexual activity with a person of inferior status.<sup>238</sup> Sexual consent was thus understood to be a signifier of this lower, passive state. This is evidenced by the Greek perception that a boy’s participation in paederastic relations was not indicative of any sexual desire, at least not in the reciprocally erotic fashion reserved among the Greeks for relations

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<sup>233</sup> Laiou (n 79).

<sup>234</sup> Halperin, (n 69).

<sup>235</sup> Halperin (n 69) does note that the practice may have differed from the ethos in some cases.

<sup>236</sup> M. Foucault, ‘The Hermeneutic of the Subject’ in P. Rabinow (ed) *Ethics: Subjectivity and Truth, Essential Works of Foucault 1954-1984* (Penguin 1994), 92.

<sup>237</sup> Halperin (n 69).

<sup>238</sup> Halperin (n 69).



between free, adult citizens.<sup>239</sup> Instead, any enthusiasm the boy might display for his older lover was interpreted as ‘co-operation’ out of a sense of gratitude and affection rather than desire so as to avoid the perception of willed passivity, a state thought to emulate femininity and thus a lower status. Xenophon makes this point rather explicitly when he suggests that ‘using men as women is to commit *hubris* against them,’<sup>240</sup> which serves as the basis for Timarchus’ crime of having committed *hubris* against himself by ‘consenting’ to sexual intercourse and thus ‘adopting the submissive sexual role of a woman.’<sup>241</sup> This view of consent as a delimiter of social roles and the rights pertaining thereto is also evident in the regulation of other forms of transgressive sexual behaviour within both Athens and Rome as examined below.

(ii) *bia / raptus*

Unlike the term *hubris* which can have no positive connotations, the use of *bia* (and its cognates) in the legal rhetoric of Classical Athens denoted actions or characteristics that were deemed beneficial or admirable, depending on the circumstances.<sup>242</sup> Often translated to mean ‘force’ or ‘violence,’ its use indicated the use of strength but need not involve a physical element, such as with the compulsion of another’s will.<sup>243</sup> While sometimes found to be associated with *hubris*,<sup>244</sup> the term *bia* is not thought to be as politicised a term as *hubris* and its meaning is more dependent on the context in which it

<sup>239</sup> D. Halperin, ‘Sexual Ethics and Technologies of the Self in Classical Greece’ (1986) 107 *Journal of Philology* 274.

<sup>240</sup> Mem. 2.1.30, as cited in Cohen, 1993 (n 79), 13.

<sup>241</sup> Cohen, 1993 (n 79), citing Plato, *Phaedrus*: 250e5. In his examination of the ‘reference speeches’ of the *Symposium* and the *Phaedrus*, Foucault notes the inquiry each speech addresses with respect to whom and under what circumstances a young boy should ‘yield’ to an older man. Foucault notes a ‘common thematics’ which include ‘that of dishonorable relations that place the boy under the domination of the lover; compromise him in the eyes of everyone, and alienate him from his family or from honorable relations...that of the feminine role the boy is led to assume: R. Hurley (tr), M. Foucault, *The History of Sexuality*, vol. 2: *The Use of Pleasure* (Vintage Books, NY 1990), 231.

<sup>242</sup> Omitowoju (n 217).

<sup>243</sup> Some scholars, however, have suggested *bia* is representative of an ‘uncivilised’ form of *peitho*, or ‘persuasion.’ See, for example, R.G. Buxton, *Persuasion in Greek Tragedy: A Study of Peitho* (CUP 1982).

<sup>244</sup> Omitowoju (n 217) cites Dem. 21.58.5 and Herodotus at 6.137.19; 53.

is used. When employed as a conjunctive with sexual language, *bia* can be interpreted to most closely resemble a modern definition of ‘rape’,<sup>245</sup> referenced by many scholars as *dike biaion* (where *dike* denotes a ‘private suit’ which had to have been brought by the offended party, as opposed to *graphē* which was a public suit to which any (free) person had standing).<sup>246</sup>

The text most identified with the association between *dike biaion* and rape is Lysias’ *On the Murder of Erotosthenes*, discussed in the previous section in relation to its commentary on *hubris*.<sup>247</sup> In this text, Lysias makes reference to the law’s treatment of sexual violence which many scholars employ as evidence of a legal distinction between consensual and non-consensual sex.<sup>248</sup> Omitowoju translates the text as follows:

Hear, gentlemen, that he [the lawgiver] orders that if someone shames by force a free person or child he shall owe double damages: if a woman, from those for whom it is possible to kill, he is included in the same provisions. Thus, gentlemen, he thought that those who use *bia* deserve a lesser penalty than those who use persuasion.<sup>249</sup>

In this passage, Euphiletus’ reference to persuasion or *peitho* is designed to denote the act as one of seduction or adultery rather than of rape where the former was punished more severely than the latter. Many scholars interpret this punitive distinction as suggesting an act of *bia* against the woman’s body (i.e. rape) was not thought as serious

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<sup>245</sup> Plato, for instance, uses *bia* to in conjunction with *hubris* to refer to the ‘forcible violation’ of women. See *Laws*, Book 9, s. 874c (n 230).

<sup>246</sup> Omitowoju cites Fisher (n 220); A.R.W. Harrison, *The Law of Athens*, vol. 1 (OUP 1968); and S.C. Todd, *The Shape of Athenian Law* (OUP 1993) among others, as examples of those who adopt the understanding of *dike biaion* as representative of a rape offence; (n 217), 55.

<sup>247</sup> A second text, Plutarch’s *Life of Solon*, 23 is also frequently cited as evidence of a sexual assault provision. See: Harrison (n 246); and S.G. Cole, ‘Greek Sanctions against Sexual Assault’ (1984) 79 *Classical Philology* 97.

<sup>248</sup> See, for example, the work of Ian Worthington who cites a number of authors who accept Euphiletus’ case as evidence of Athenian attitudes towards punishing rape: I. Worthington (ed) *A Companion to Greek Rhetoric* (Wiley Blackwell 2010), 284. Cole makes the point explicitly with respect to the Plutarch passage, suggesting this later development ‘encouraged distinction between rape as an act of violence and *moicheia* as an act of choice’; (n 247), 103.

<sup>249</sup> Lys. I.32.1-5; as cited by Omitowoju (n 217), 63-64.

as an act of force against her soul (in the case of persuasion) thus reinforcing a legal significance to the woman's consent.<sup>250</sup> This reading seems misleading for two reasons. First, the concern with seduction seems more likely to have been about the dangers which sexual infidelity posed to patrilineal legitimacy than the violation of a woman's soul. Omitowoju argues that the language used by Euphiletus is telling, given that *bia*, while a possible descriptor of forced sex, is accompanied with the verb *aischunein* meaning 'to shame' and suggests that it is more likely a description of the shameful behaviour which Eratosthenes has shown in entering Euphiletus' home without (its owner's) permission.<sup>251</sup> Secondly, to position Euphiletus' wife's consent as the factor which designates this offence as one of *bia* or rape is to grant women a status they did not have in Athenian society. Instead, it is the consent of her *kurios* that matters and thus the crime has been in Eratosthenes' theft of Euphiletus' property (or a 'forcing of his will' with respect to it.)<sup>252</sup> To establish a category of female consent which is somehow left independent or unmediated by the consent of her *kurios* would be to insert an anomaly in Athenian legal society and women's place within it. At best, a notion of female sexual consent is 'only ever a tangential issue in respect to the legal treatment of a crime' and the degree to which its *hubristic* consequences might impact upon male parties.<sup>253</sup> The legal consideration of the use of force in these Classical contexts demonstrates the proprietary interest consent represents (when exercised by a male citizen) as well as the connotations of passivity and lower status it signified within a sexual context.

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<sup>250</sup> Cole (n 247); and Harrison (n 246).

<sup>251</sup> Omitowoju (n 217), 64.

<sup>252</sup> Sawyer confirms this view describing the nature of women's lack of autonomy during the Hellenistic period as evidenced by the 'value' allotted to her virginity, suggesting 'that in this society she was numbered among the household's possessions. To damage her would be an act of vandalism or, in taking her as a wife without her father's consent, an act of theft'; D. Sawyer, *Women and Religion in the First Christian Century* (Routledge 1996), 38.

<sup>253</sup> Omitowoju (n 217), 69.

A similar interpretation is made of the Roman term *raptus*, widely understood to refer to forcible abduction and associated with a proprietary theft (of another man's female dependent(s)).<sup>254</sup> While the term does not strictly include a sexual connotation, it is thought to have been presumed by the Classical period.<sup>255</sup> The offence remained one subject to private suit until the rule of Constantine when it was made a public crime punishable by death.<sup>256</sup> Forcible abductions were a common (and ritualised) component to nuptial and other religious ceremonies where brides (and boys in some paederastic rites of passage) were 'taken off' with the assumption that sexual activity would ensue.<sup>257</sup> However, in such instances the sexual act had to remain an apparent or public one so as to differentiate it from acts of 'actual violence [which was] equally condemned by public opinion and by the law.'<sup>258</sup> Even in these instances, consent was an immaterial concept within both social and legal framings of permissible (and illicit) sexual activity.

Such practices may have influenced the development of the concept in Roman law of 'coerced consent' where the presence of force was often insufficient to negate a finding of free choice. Diana Moses suggests that Roman law during the period between the end of the Republic and the beginning of the Principate struggled with the limits of acceptable use of force resulting in a conceptual and temporal 'middle ground' where

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<sup>254</sup> Moses (n 79) cites the *Latin Sexual Vocabulary* entry for 'rapio' which reads: 'to drag off into captivity': J. Adams, *Latin Sexual Vocabulary* (Johns Hopkins Press 1990), 175.

<sup>255</sup> This inclusion was continued into the medieval period and is the source of the contemporary use of the term 'rape'; see: K. Gravdal, *Ravishing Maidens: Writing Rape in Medieval French Literature and Law* (University of Pennsylvania Press 1991).

<sup>256</sup> Gravdal (n 255).

<sup>257</sup> H. Licht, *Sexual Life in Ancient Greece* (Routledge 1932). See also Bishop C. Thirlwall, *A History of Greece*, vols. 1-8 (Longman Rees 1835), 175-176 for commentary on this.

<sup>258</sup> Licht (n 257), 134-135.

exceptions were carved out, including times of war<sup>259</sup> and elopements (where the father's consent had not been sought).<sup>260</sup> The continued influence of the Greek notion of *peitho* can also be seen in early Roman treatments of *coacta voluit* (as termed in the *Corpus Juris Civilis*)<sup>261</sup> where coercion did not vitiate an understanding of preference or persuasion: 'although she was forced she willed it.'<sup>262</sup> Thus, the Roman understanding of coercion did not act to negate one's will but rather was thought to re-direct it. In the case of women and transgressive sex, this re-direction was often to a more illicit end. Similar to the role assigned to the will of Euphiletus' wife in Lysias' account of the murder of Eratosthenes, a determination of whether a woman had been persuaded (by force) into illicit sexual activity informed her culpability rather than that of her perpetrator. In Roman terms, this would have elevated the offence to one of adultery or *stuprum* given the shame it brought upon her husband or guardian and the danger it brought upon her household (and heirs) with respect to legitimate claims to citizenship. The following section examines these offences of adultery in both ancient Athens (*moicheia*) and Rome (*stuprum*) to further explore this proprietary-informed role of sexual consent.

### (iii) *moicheia* / *stuprum*

Contrary to modern classifications of 'rape' as the most severe of sexual crimes,

Classical Athenian society reserved this place for the offence of adultery. As such, the

<sup>259</sup> A similar exception was made in Athenian law for the sexual exploitation of women which occurred by an enemy in war. Such acts were excluded from the category of *moicheia*, discussed in the following section.

<sup>260</sup> Canon law referred to such circumstances as *raptus*, reinforcing the argument made by Omitowoju (n 217) that the woman's consent was immaterial to legal and political determinations of an act's validity. See also Gravdal (n 255), 7.

<sup>261</sup> Moses (n 79), 40.

<sup>262</sup> Moses (n 79), 40. See also Stafford's examination of Plutarch's text, 'Advice to the Bride and Groom' where the role of persuasion or *peitho* is positioned as existing in a 'long tradition... against *bia* (force)': E. J. Stafford, 'Plutarch on Persuasion' in S. B. Pomeroy, (ed) *Plutarch's 'Advice to the Bride and Groom' and 'A Consolation to His Wife'. English Translations, Commentary, Interpretive Essays, and Bibliography*. (OUP 1999), 162.

role of consent in the early Greek period contrasts significantly with the ‘morally transformative’ power current scholarship designates the concept as having in its demarcation of ‘good’ and ‘bad’ sex.<sup>263</sup> In both Athens and Rome in the Classical era, women’s sexual consent was immaterial but for circumstances of seduction or adultery where its ‘transformative’ power was to further criminalise or shame the behaviour at issue. In this way, where female consent to sexual activity can be seen to take form in these early juridical treatments, ‘it does so only by reference to specific male concerns,’ often serving to aggravate the nature of an offence (rather than legitimize it).<sup>264</sup> More importantly, I think, is that the concept enters the discourse only in retroactive readings of Classical orations and laws. While modern notions of consent are understood to imply autonomy, there is evidence to suggest that the concept was a signifier of other values within the polis, most particularly social status and property interests.

This is perhaps best seen in the Athenian category of *moicheia*. Although some scholars, (most notably Cohen),<sup>265</sup> have argued that the Athenian offence of *moicheia* is limited to adultery, (defined as a ‘voluntary violation of the marital bond’),<sup>266</sup> I am persuaded by the arguments of others who suggest that the offence is more akin to the Roman term *stuprum* which encompassed a more general grouping of transgressive sexual behaviours.<sup>267</sup> Archaic uses of *stuprum* are thought to have meant ‘pollution’ and certainly as the offence was adapted over time (and codified during the Augustan era), an understanding of it as an act of shaming or dishonouring was maintained. As such, considerations of consent on the part of a victim of *stuprum* were largely irrelevant

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<sup>263</sup> See: Hurd (n 6); Archard (n 49); and A. Wertheimer, *Consent to Sexual Relations* (CUP 2003).

<sup>264</sup> Omitowoju (n 217), 72.

<sup>265</sup> Cohen (n 79).

<sup>266</sup> As cited in Omitowoju (n 217), 73.

<sup>267</sup> Omitowoju goes to great lengths to refute Cohen’s position, see (n 217), 73-91. See also Moses (n 79) for a discussion of the wider application of *stuprum*.

given that the word was used rather neutrally with respect to whether the sex that had occurred was forced or not. Instead, the act was shameful on account of the victim having been used and one's consent to such use could not undo the damage done.<sup>268</sup> In this way, the offence of *stuprum* is better understood as protecting the propriety and patrilineal interests of male citizens in early Roman society than as protecting sexual agency. Certainly, this argument can be made for the Greek offence of *moicheia* which could be brought as a *graphē* and thus would fall within the category of offences 'with political rather than purely personal resonance.'<sup>269</sup> *Moicheia* could thus be interpreted to be a means by which the polis regulated not simply the limits of acceptable sexual behaviour but also matters of a greater political interest (such as legitimate familial lineage and the boundaries of rightful citizenship). In fact, Stephen Todd makes this explicit when he suggests that 'the *graphe moikheias* is used against anyone attempting to pass off his suppositious child as the son of a citizen.'<sup>270</sup>

The Augustan moral reform at the turn of the first millenium is thought among many scholars to have been an attempt to regulate these boundaries of citizenship given its focus on rewarding procreation within marriage and penalizing childless and unmarried unions.<sup>271</sup> As a result of Augustus' *leges Juliae*, acts of *stuprum* became punishable by public law and were widely viewed as accusations against the victim's (usually a woman's) moral virtue.<sup>272</sup> Further, the invocation of the criminal law to enforce regulations on sexual behaviour (as in Augustus' *lex Julia de adulteriis*) allowed for

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<sup>268</sup> Unless, of course, the consent at issue had been offered by a *kurios* and thus represented a legitimate contract for the sexual availability of the woman involved.

<sup>269</sup> Omitwoju (n 217), 86.

<sup>270</sup> As cited in Omitwoju (n 217), 95.

<sup>271</sup> R. Bauman, *Women and Politics in Ancient Rome* (Routledge 1992). Bauman also suggests the reformation project was a response to the scandal that arose from Augustus' daughter Julia's alleged promiscuous and adulterous conduct; see Chapter 9.

<sup>272</sup> Moses (n 79).

further specification of instances where force was used in committing the act, (e.g. *per vim stuprum*, or *raptus ad stuprum*) leading some writers to postulate whether this development began to direct Roman jurisprudence towards a contemplation of the subjective state of mind of the victim. Diana Moses explores this issue suggesting that the distinction between acts accomplished by force and those that took place consensually was not an articulation which ‘fit easily into Roman legal thinking and categories.’<sup>273</sup> Rather, in most sexual offences of the time, the sexual act itself was sufficient to warrant guilt irrespective of how it had occurred.<sup>274</sup>

This, of course, changes dramatically when the consent at issue is that of a male citizen, where the will of the *kurios* (or its absence) is a definitive component to establishing the commission of a sexual offence. At issue in both accounts is a violation of male proprietary rights to both access and regulation of female sexuality. In this way, consent operates as a juridical product of value exchanged among men of sufficient political status rather than a form of agency. Women were, after all, the ‘legal transmitters of the rights of inheritance and political participation’ and thus the regulation of their sexual relationships was a key component to ensuring the stability of male property and their family lines. The legal and social recognition and instatement of consent was essential to maintaining this system. Consent in this context presumes male ownership of female sexuality and its value as a means of exchanging them. This is a slight shift from Luce Irigaray’s argument about the ‘market’ of women’s sexuality where the exchange value of a woman’s body is intelligible only from the vantage point

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<sup>273</sup> Moses (n 79), 50.

<sup>274</sup> This is seen in Roman considerations of ‘coerced consent,’ discussed earlier, where an argument of the presence of force or duress serves merely to show how the will of the victim was directed or by what means ‘persuasion of the will’ can be said to have occurred. Similarly, the Athenian concept of *moicheia* does not appear to contemplate female consent in its definition. Omitowaju presents a segment from Xenophon’s *Hiero* (3.3) where the offence is made out when sex has occurred both through the woman’s ‘own fault’ and her ‘misfortune’ (n 217), 93-94.



of a ‘speculating third party’ (i.e. male desire).<sup>275</sup> Early Athenian and Roman societies did value the female body for ‘the work it could do’ but the provision of access to these labours (via *kurios* consent) was a product of value in its own right, asserting male proprietary rights, ensuring patrilineal legitimacy, and policing these boundaries of status and kinship through the invocation of shame.<sup>276</sup> Further, this function of consent-as-proprietorship served to alienate women from mastering their own bodies and subjectivities apart from male ownership and desire.<sup>277</sup> Any relationships or actions on the part of women (among others) which did not fit this frame had to take place outside the polis.

#### Ancient Outlaws: Unintelligible Acts

Judith Butler has suggested two dimensions to the law’s disciplinary power, the first being a regulation (of what it permits) through acts of prohibition or limitation and the second, an effective production of subjects, gestures, and practices it is unable to contain.<sup>278</sup> Early Athenian and Roman approaches to regulating sexual conduct can be seen to produce a population of others through a process of exclusion which occurs on two fronts. The first is an exclusion on the basis of application. The laws regulating sexual conduct were applicable only to free citizens of the state. Foreigners, women

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<sup>275</sup> L. Irigaray, *The Sex which is Not One* (C Porter, tr., Cornell Univ. Press 1985). Irigaray’s work provides some insightful avenues for thinking through the politics of sex and its legal regulation within the Antiquity context given her study of Antigone. According to Judith Butler, Irigaray contends that Antigone signified the ‘transition from the rule of law based on maternity... to a rule of law based on paternity’ – an observation that aligns (partially) with my own view of the role of consent in preserving patrilineal interests and patriarchal control of female sexuality; J. Butler, *Antigone’s Claim: Kinship Between Life and Death* (Columbia University Press 2000): 4.

<sup>276</sup> I take this phrase ‘the work it could do’ from Pamela Haag’s chapter ‘Chastity is Only Good for the Work it Can Do.’ Her use of it is a reference to Caroline Dall’s publication, *The College, the Market, and the Court: Women’s Relation to Education, Labor and Law* (Lee & Shepard 1867), as cited in Haag (n 17), 188.

<sup>277</sup> Judith Butler, in conversation with Gayle Rubin, has also suggested that these systems which prioritize kinship relations are in the service of heteronormativity, see: ‘Sexual Traffic’ (1994) 6.2+3 *differences: A Journal of Feminist Cultural Studies* 62.

<sup>278</sup> J. Butler, ‘Co-habitation, Universality and Remembrance: Further Reflections on Israel/Palestine’ (Lecture, Department of Psychosocial Studies, Birkbeck University of London, 24 May 2010).

without a *kurios*, prostitutes, slaves, and persons of questionable social status were not subjects of the law. These persons could neither bring a charge of sexual misconduct (as articulated in any of the aforementioned offences) nor be subject to one.<sup>279</sup>

A second form of exclusion is on the basis of (socio-political) recognition where certain sexual acts were not seen as invoking a concept of consent either because of the act itself or the subject engaged in it. Thus, where the sexual behaviour of persons fell outside the civic interests of the state, a particular ‘freedom’ was produced. Omitwoju cites the example of the character Glykera in Menander’s play, *Perikeiromene*, who is understood to be a *pallake* or non-citizen.<sup>280</sup> Despite conduct which would have transgressed several norms of the period, Glykera is regarded as ‘her own mistress’ given that she has no *kurios* whose consent is required to authorize her sexual availability. Similarly, in the case of Apollodorus’ prosecution of Neaera, a woman who is a foreigner to Athens (and thus not a citizen) and is living ‘as if in marriage’ with Stephanus, an Athenian.<sup>281</sup> The union would not have been recognised as valid, with laws in place to prohibit any children of the relationship from claiming citizenship.<sup>282</sup> A daughter is born to the couple and following the Peloponnesian War, legal reform results in such unions being criminalised with a penalty of slavery for the woman and a fine for the Athenian man. In Apollodorus’ prosecution of Neaera, he provides a brief description of her life, so as to establish her foreign status.<sup>283</sup> This history includes child prostitution and several acts of illicit sexual behaviour with Athenian men; however, as

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<sup>279</sup> Unless, of course, their conduct implicated or endangered the status of a respectable free citizen, as was the case with Neaera, *infra* note 284 and accompanying text.

<sup>280</sup> Omitwoju (n 217), 81-82.

<sup>281</sup> Demosthenes 59, *Against Neaera*; as cited in A.T. Murray (tr) *Demosthenes with an English translation* (Harv. Univ. Press 1939), online at ‘Perseus Digital Library’: < <http://www.perseus.tufts.edu/hopper/>> . Last accessed: 18 December 2013.

<sup>282</sup> Omitwoju cites the Periklean citizenship law of 451-450 BCE; (n 217), 42.

<sup>283</sup> This prosecution would have been a *graphē xenias*, i.e. the unlawful exercise of citizenship rights; Omitwoju (n 217), 125.

Omitwoju notes, Apollodorus is careful not to use *hubris* to describe any of these acts. To do so would be to introduce the possibility of Neaera having a status she is not entitled to have. ‘There is no indication that what happens to Neaera... could ever form the basis of a *graphē hubris*... because Neaera does not have the status to maintain it.’<sup>284</sup> Consent in Neaera’s case is elided. To mention it would be to produce a *kurios* Neaera could not have and to give juridical recognition to her (transgressive) union with Stephanus. Where, however, a subject was already recognised as having status, consent could act to vitiate it. Cohen notes a passage from Demosthenes which describes Androtion, a male prostitute, as having suffered *hubris* at the hands of those ‘men who had no love for him but could pay his price.’<sup>285</sup> These relationships would have fallen outside the ambit of paederastic mentorship and as such, Androtion has lost his status by ‘consent[ing] to conduct to which any honourable free man should never consent.’<sup>286</sup>

Consent among this group of outcasts can be seen as a transgressive act both in terms of the engagement it signifies with sexual activities and unions unsanctioned by the state, and in terms of the expression of agency it represents among a group not granted this proprietary (nor subjective) right. Important to note, however, is the association of individualism with self-ownership embedded within the structure offered by liberal conceptions of consent that this marginalised population problematises. Similar to the oxymoronic designation of Victorian prostitutes among other ‘immorals’ as ‘public women’ who were assigned to the public arena without any of its state-sanctioned rights, the ‘outlaws’ of ancient Greek and Roman societies were neither owned nor

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<sup>284</sup> Omitwoju (n 217), 47.

<sup>285</sup> Dem 22.58, ‘Against Androtion’ as cited in Murray (n 281).

<sup>286</sup> Cohen, 1993 (n 79), 13.

substantively capable of being self-owners.<sup>287</sup> The consent-as-autonomy model thus operates within this ‘outlaw’ sphere in a paradoxical fashion in at least two ways.

First, the autonomy of the ancient outcast is possible only because these acts of (transgressive) sexual expression occur outside of the state and thus do not threaten its concerns with policing citizenship and property rights. As such, the outlaw’s consent is only autonomous in its lack of socio-political consequence or recognition. While the liberal subject is autonomous in its self-owning, proprietary rights-bearing capacity, the outcast of the ancient society exercises agency in a non-public arena, challenging the possessive individualism at the heart of dominant modern discourses of consent. This stands in stark contrast to the autonomy which modern accounts have argued is made most manifest in consent. With a desire to preserve a dichotomy between the public and private spheres of human activity, liberal political theories argue for minimal government intervention, most notably within ‘private’ matters. Defining liberty as the freedom to be ‘let alone,’ these theories found the most promise for this independence in private property rights and a controlled role for state governance of economic affairs. In such models, consent is the means by which a citizen’s natural right to non-interference is recognised and exchanged for security. While contemporary scholars will often read consent-as-autonomy in accounts of early Greek and Roman treatments of sexual offence regulation, a conception of the individual most free from state intervention and self-determinative of private relations is more evident among those deemed ineligible for consent within state borders. Further, some aspects to modern liberalism’s push for a more positive notion of liberty (i.e. a freedom *to* act rather than a

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<sup>287</sup> Patricia Williams makes a similar claim in her text, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard Univ. Press 1991) between states of being ‘owned’ and ‘unowned.’

freedom *from* (state) action) is better exemplified along these ‘outer limits’ to the polis, as suggested in Menander’s description of Glykera as ‘her own mistress.’<sup>288</sup>

Second, the status of the outlaw is produced through at least a partial adherence to the normative categories of subjectivity found within the polis. These ‘others’ are socially intelligible in their physical form (e.g. as ‘women’ or ‘men’) but not in the attributes or behaviours they participate in, leaving their identities as ‘homosexual men’ or ‘sexually autonomous women’ incoherent. The myth of Caeneus, found in Ovid’s *Metamorphoses*, provides a good example of this code of intelligibility (and the gendered nature of Classical consent.) Caeneus was a king’s daughter who had rejected all of her suitors before being coerced into sex by Poseidon who agreed to grant her any wish she desired in return for her submission. Her wish was never to have to consent again and so Poseidon gave Caeneus an ‘impenetrable’ body – that of a man.<sup>289</sup> A woman with the authority (or sufficient ‘self-ownership’) to refuse consent was an unintelligible subject within the polis, demonstrated by Caeneus’ wish manifesting itself in a gender reassignment. A similar circumstance can be seen in the story of Antigone, as told by Sophocles. Antigone lacks the socio-political status of a legal subject both because of her gender and the fact that she was the daughter of an incestuous union. Her brother is declared a traitor of the state by Creon, her uncle and the newly crowned king of Thebes, and is denied a proper burial. Antigone violates these orders and buries her brother’s body. When she is called before Creon to speak to her crimes, her transgressions against the state become two-fold: first, in her initial act of disobeying

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<sup>288</sup> I employ ‘outer limits’ in reference to Gayle Rubin’s conception of the ‘charmed circle’ of good, normal, state-sanctioned (and in Rubin’s argument, heterosexual) forms of sexuality: G. Rubin, ‘Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality’ in H. Abelove, et. al. (eds) *Lesbian and Gay Studies Reader* (Routledge 1993), 3.

<sup>289</sup> Book XII: 525-532; as cited in L. Brisson, *Sexual Ambivalence: Androgyny and Hermaphroditism in Graeco-Roman Antiquity* (J. Lloyd, tr, Univ. Calif. Press 2002), 62.

Creon's orders; and second, in her act of appearing before the state to speak to her crimes. This latter act would have been one reserved for male citizens, thus, in asking Antigone to respond to her initial act of disobedience, Creon imparts a status to Antigone that she is not entitled to. This is explicitly acknowledged in the play when Antigone is called 'manly' by the chorus and when Creon accuses his son, Haemon (who is engaged to be married to Antigone), of being 'inferior to a woman' for his attempts to support her.<sup>290</sup> Here, Antigone's autonomy – her act of independence and, arguably, self-rule (as opposed to obedience to state sovereignty) – is unintelligible. Moreover, as Butler has suggested, '[h]er act is never fully her act.'<sup>291</sup> Rather, the autonomy Antigone exercises is not hers but that of a man and thus, it exists only in her transgression of the norms of intelligibility that serve to delegitimize her identity as an autonomous subject. As Butler notes:

[Antigone] asserts herself through appropriating the voice of the other, the one to whom she is opposed; thus her autonomy is gained through the appropriation of the authoritative voice of the one she resists, an appropriation that has within it traces of a simultaneous refusal and assimilation of that very authority.<sup>292</sup>

This is akin to the paradox (discussed in the previous chapter) that is housed within contemporary understandings of consent, where the autonomy that consent is meant to embody must ultimately be unrealisable so as to continue to hold the promise of universal applicability. This is particularly evident when this claim to autonomy (via consent) is made by those whose very status or subjectivity challenges the norms of intelligibility upon which the consent-as-autonomy story is built. Antigone, Caeneus, Glykera, and other transgressors of these rules of the ancients may be seen to act autonomously, but in so doing, they move out of the frame of intelligibility, and thus,

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<sup>290</sup> Butler (n 275), 8.

<sup>291</sup> Butler (n 275), 10.

<sup>292</sup> Butler (n 275), 11.

out of the scope of consent. Through a set of preconditions to consent, they are made, to employ Butler's language, 'stateless within the state.'

These spectral humans, deprived of ontological weight and failing the tests of social intelligibility required for minimal recognition include those whose age, gender, race, nationality, and labor status not only disqualify them for citizenship but actively "qualify" them for statelessness. This last notion may well be significant, since the stateless are not just stripped of status but accorded a status and prepared for their dispossession and displacement; they become stateless precisely through complying with certain normative categories.<sup>293</sup>

While this lack of coherence in the consent-as-autonomy story may be more visible when examining a historical context where the rules of exclusion from socio-political recognition are more starkly or explicitly stratified, the question remains as to whether consent and its contemporary preconditions function all that differently today. In the Canadian Supreme Court case of *Mara*, for example, (where charges of obscenity were laid against a tavern when its dancers allowed patrons to touch and kiss them during performances), the court dismissed the issue of consent on the grounds that the acts in question fell too far outside the realm of common decency. Writing for the court, Sopinka J stated:

It is unacceptably degrading to women to permit such uses of their bodies in the context of a public performance in a tavern. Insofar as the activities were consensual, as the appellants stressed, this does not alter their degrading character. Moreover, as I stated in *Butler*, at p. 479, '[s]ometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.'<sup>294</sup>

In this case, the 'autonomy' that consent is meant to signify is denied on the basis that it was enacted in ways that did not conform to dominant understandings of women and female sexuality. Akin to the effect a woman's consent could be seen to have on an offence of *hubris* in the Classical context, 'the very appearance of consent' in the *Mara*

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<sup>293</sup> J. Butler and G. Spivak, *Who Sings the Nation State?* (Seagull 2007), 15-16.

<sup>294</sup> [1997] 2 S.C.R. 630, [35].

case serves as an aggravating factor to the alleged harm. Moreover, this case demonstrates that the ‘freedom’ to consent is one that must be enacted in compliance with prescribed ways of being and acting in order to be recognizable, suggesting that the denial of autonomy experienced by Antigone is a more familiar experience for non-conforming subjects in the present day than the consent-as-autonomy story would lead one to believe.

### (Post)Modern Reflections

This chapter’s survey of how early Greek and Roman societies addressed sexual consent has demonstrated that consent has performed functions and housed meanings that run contrary to the foundationalist story of autonomy. In contrast to contemporary views of consent as a signifier of an ethical or equitable transaction, there have been both circumstances and subjects for whom consent aggravates rather than mitigates inequality. This is a concern raised by many of the left-leaning critiques examined in the previous chapter which strive to remove a distinction between the individual and her society. Rather than positing individuals as autonomous agents, these critiques suggest that subjects are tied to the communities in which they act, thus limiting and influencing the parameters of their choices. Subjects of any given socio-legal structure are not ‘free’ from the constraints of these systems. Rather, legal rights are correlative to others’ vulnerabilities. Thus, even critical reformulations of the liberal account of consent are subject to the criticism that they do not adequately account for the relationship between juridical rights and socio-economic and cultural restraints.<sup>295</sup>

Wendy Brown, in her examination of ‘constitutive dualisms’ in liberal discourse, suggests that women are situated (ontologically within and through consent) as

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<sup>295</sup> Critiques offered by Robert Paul Wolff and Susan Moller Okin on John Rawls’ *A Theory of Justice* (n 103) are good additional examples of these left-leaning perspectives: R.P. Wolff, *Understanding Rawls* (Princeton Univ. Press 1977); S.M. Okin, *Justice, Gender, and the Family* (Basic Books 1989).



submitting, assenting to terms that they do not participate in framing.<sup>296</sup> Consent and its various ontological roles are not, then, power neutral, yet liberal theories of consent and their critiques seem ill-equipped to address how consent functions as a license not to property rights or sexual access, but to cultural recognition.<sup>297</sup> Explorations of Athenian rape laws and attitudes involve ‘examining not just the sorts of behaviour they regulated, but the sorts of people whose behaviour they seemed to problematise or the sorts of people whom they sought to protect.’<sup>298</sup> I would contend that the same should be said for investigations into consent today. While Omitowaju describes female consent in Classical Athens as ‘illegitimate’ in that it performed different functions than contemporary theories of consent would anticipate (e.g. aggravating or altering the offence as seen in the case of *hubris*), I would argue that consent in the ancient context reveals more a story of intelligibility than of legitimacy given its role in determining what subjects are recognizable rather than what actions are justified.

This is perhaps best illustrated by the population of ‘outlaws’ examined in the previous section. Rather than simply representing various incarnations of ‘illegitimate’ or incomplete forms of consent, consent functions within the Athenian polis to not only regulate this population but, in the first instance, to produce it. The outcast represents the ‘necessary other’ for the creation and control of the ideal citizen, the latter made visible only through the transgressions of the former.<sup>299</sup> My examination of sexual

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<sup>296</sup> Brown (n 125).

<sup>297</sup> Both classic and modern forms of liberalism, while demonstrating a shift in terms of rights of privacy and spheres of acceptable government intervention, construct the ‘self’ along a continuum of property-as-freedom, where consent figures against coercion. While critiquing this liberal notion of the ‘self,’ more communitarian and socialist analyses are unable to escape the juxtaposition of this dichotomy, reinforcing a discourse founded in an (autonomously) acting subject.

<sup>298</sup> Omitowaju (n 217), 116.

<sup>299</sup> This follows Foucault’s understanding of law’s productive power in demarcating particular populations as both marginal and in need of control. Take, for example, his comments on the ‘success’ of the prison system in his seminal work, *Discipline and Punish*:

consent in early Athens and Rome reveals a legal concept that is applied selectively and differentially on the bases of gender, social status, age, and sexual practice (discretions that are arguably as evident in contemporary articulations of consent). Some might suggest that this shows consent to be a right or privilege only available to certain subjects, be those men or free citizens or married, heterosexual couples. This might lead reformists to suggest that the problems with consent and its application can be remedied by simply expanding the category of persons to whom this right or privilege is available. The foundation for making discernments about this expansion project would vary depending on which theoretical camp critiques of consent were coming from; yet, these analyses and their reform projects presume a fixed quality to consent. It is merely a tool that needs to be picked up and redirected in the 'right' way. The dominant narrative of consent as a form of freedom, whether to contract or to self-determine, is maintained.<sup>300</sup>

Further, while some commentators might argue that the outcasts of ancient Athens and Rome represent an explicit example of socio-economic inequity where the law can be seen to service the interests of the wealthy and privileged, these analyses fall short of explaining how these exclusions contribute to, rather than contest this 'natural' story of consent as a freedom pre-existing the subject who enacts it. I would suggest that what is

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For the observation that prison fails to eliminate crime, one should perhaps substitute the hypothesis that prison has succeeded extremely well introducing delinquency, a specific type, a politically or economically less dangerous -and on occasion, usable- form of illegality; in producing delinquents, in an apparently marginal, but in fact centrally supervised milieu; in producing the delinquent as a pathologised subject (n 213), 277.

<sup>300</sup> See, for instance, the critique of radical feminist approaches to sexual consent offered by Moore and Reynolds, 'Feminist Approaches to Sexual Consent: A Critical Assessment' in Cowling and Reynolds (n 13). While recognising the difficulty presented by a context where women have only a 'partial engagement in an unequal sexual contract' and sexual consent is 'the ideological misrepresentation of hetero-patriarchal sexual ownership, control and abuse,' Moore and Reynolds maintain a commitment to this dominant narrative of consent-as-autonomy. They state: 'A concept of sexual consent that cannot appreciate the meaning of women's agency and autonomy, even under conditions of social and sexual inequality, will be of little use in theorising women's ownership of their sexuality short of radical social and structural change' (n 13), 29-30.

at issue in contemporary applications of consent is not the quality of free action, property protection, or the capacity for reasonable self-control, but rather the constitution of the public domain. Law has the power to give expression to imagined boundaries and spatialisations and to define the parameters for who might inhabit these spaces.<sup>301</sup> Further, although many critical legal theories might suggest that the outcast population represents a ‘failed approximation’ of the ideal citizen and thus presents an opportunity to subvert or transform the norm, Butler’s work posits such constitutive failings as produced by the norm itself (through a demarcating of the ‘other’) and indicative (if not productive) of the norm’s plasticity and strength. Thus, when the law fails, it is re-imagined and re-tooled, but not rejected. The very difference or diversity which demonstrates the law’s inadequacy is used to legitimise its borders.

### Conclusion

This chapter has sought to investigate the ‘conditions of possibility’ for reconceptualising sexual consent within the ancient eras of Athens and Rome. It began with an examination of three legal categories in which sexual behaviour was regulated in the Classical period, including the offences of *hubris*, *bia*, and *moicheia* or *stuprum*. How consent could be seen to operate in each of these offence categories as a form of proprietorship in relation to the familial interests of free, male citizens was contrasted with the experiences of consent among the state’s outcasts, where consent was seen to serve as a form of juridical and cultural recognition. In each case, a destabilisation of

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<sup>301</sup> See, for instance, the work of Leticia Sabsay who examines the legal determinations of sex work in Buenos Aires as ‘decriminalised’ or ‘permissible’ in certain (‘red-light’) districts of the city as demonstrative less of the law’s prohibitive powers than its ability to demarcate the sexual shape of the public sphere: L. Sabsay, ‘The Subject of Diversity: Sexual Borders, Citizenship, and the Public Sphere’ (Lecture, *Cosmopolitanism, Peace, and Conflict Intensive Summer Programme*, Utrecht University, 2 February 2010). Audio available online at: < <http://131.211.194.110/site1/Viewer/?peid=01adc462bcc245c98042365302c5cf09>>. Last accessed: 18 December 2013.

the liberal grammar which dominates contemporary theories of consent was sought, particularly through a contemplation of those subjectivities for whom neither the ancient nor modern conceptions of consent provided adequate explanation.

In this way, this chapter might be seen as a comparison of the ‘consent of the Ancients’ with the ‘consent of the Moderns,’ yet my own analysis lacks the certainty with which Constant advocated a revised notion of liberty on the basis of his comparative analysis. Instead, my project is not one of revision or reform but merely of reflection. This chapter’s earlier discussion of sexual offence regulation suggests that within the Athenian polis, consent operated with a presumption that citizens use their bodies reasonably and without shame – a mandate that, as the next chapter will demonstrate, was carried through into the medieval period’s treatment of consent (albeit reformulated into a Christian paradigm).<sup>302</sup> This suggests that exploring narratives of consent within contexts that challenge the ahistorical story told of consent-as-autonomy reveals that law’s use of consent may implicate questions of prescriptive subjectivity and socio-political recognition as much as (if not more than) notions of autonomy. Finding these counter-narratives, however, is not easy work. It requires reading against the grain of powerful and pervasive stories of consent that boast the persuasion of the ‘common sense.’ There is likely no area of law where this autonomy story is more secured than in the field of medical law and its doctrine of informed consent. Reading against this story is the work of the next chapter.

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<sup>302</sup> Foucault’s observations of pederasty in the second volume of his *History of Sexuality* provide some evidence to support this ethos of moderation, suggesting an early Greek view of temperance in the exercise of power where the ‘ethics of pleasure’ required ‘subtle strategies that would make allowance for the other’s freedom, his ability to refuse, and his required consent’ (n 241), 199. It is important to note, however, that the ‘consent’ being referenced in this passage was that of either fully-fledged male citizens or their younger counterparts. The notion that consent, within the ancient context, could have entailed a ‘right to refuse’ for anyone else would not have been an intelligible contention.

### CHAPTER THREE – MEDIEVAL MEDICINE

My God, my God, how soon wouldst thou have me go to the physician,  
and how far wouldst thou have me go with the physician?<sup>303</sup>

#### Introduction

The field of medical ethics is one where change is both expected and exigent.

Developments in biotechnology and its applications create a host of possibilities for clinical medicine while complicating existing frameworks for treatment and decision-making. Debates concerning reproductive technologies, organ donations and transplants, life support systems, death assistance, and genetic research represent only some of the places where medicine, law, and ethics converse about the value and limits of human life. Despite the vast differences both between and within these fields, the doctrine of informed consent provides a common platform for these varied analyses, leading some commentators to suggest that consent serves as a lynchpin for bioethical research and its regulation.<sup>304</sup> This pivotal role for consent within medical law and ethics scholarship persists notwithstanding a significant number of problems, often positioned in the literature as deficiencies in the doctrine's level of specificity or scope.<sup>305</sup> Scholars of all stripes question the justificatory bases for consent and whether the requirements for establishing informed consent are sufficiently stringent or extend to an adequate array of arenas of medical research and practice.

Bioethicists are, however, fairly uniform in their view of informed consent as a modern-day construction established against long-standing traditions of paternalism and power

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<sup>303</sup> J. Donne, *Devotions Upon Emergent Occasions*, IV: Exp. (first published 1624, CUP 1923).

<sup>304</sup> Wolf (n 5).

<sup>305</sup> N.C. Manson and O. O'Neill, *Rethinking Informed Consent in Bioethics* (CUP 2007).

within doctor-patient relationships. Histories of the informed consent doctrine often begin with a citation of the Hippocratic Oath, highlighting its implicit endorsement of deception to gain patient trust and a ‘doctor knows best’ approach to decision-making, before moving ahead to an ‘emergence’ of informed consent in the twentieth century.<sup>306</sup> This has positioned the Nuremberg Code of 1947 as medical law’s first appearance of ethical regulations based on informed consent.<sup>307</sup> This view of informed consent as a historically specific and legally created doctrine creates a ‘truth’ about consent and how it operates in medical law which is bound to these roots of paternalism and their presumed counterpart of patient autonomy. Informed consent requirements, procedures, and their efficacies are assessed in contemporary scholarship in relation to how well they advance patients’ rights to self-determination and choice.<sup>308</sup> Further, even critiques or proposed reforms of the consent doctrine must reference this paternalism debate to be intelligible; they must re-engage with this discourse of individual choice and its liberties.<sup>309</sup> This persists even amidst apparent paradoxes created by the ever-increasing

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<sup>306</sup> See: Faden and Beauchamp (n 81); Jackson (n 114); and Peter J. Murray, ‘The History of Informed Consent’ (1990) 10 *Iowa Orthop. Journal* 104 as examples of this practice.

<sup>307</sup> Vollman and Winau, while recognising this as the general view, do depart from it slightly suggesting evidence of consent-informed guidelines for human experimentation as early as the nineteenth century: ‘Informed Consent in Human Experimentation Before the Nuremberg Code’ (1996) 313 *British Medical Journal* 1445. Similarly, Manson and O’Neill (n 305) link the doctrine’s roots to the European Enlightenment period and theories of governmental legitimacy in early political liberalism, although they also cite the Nuremberg Code as ‘the first authoritative statement of consent requirements in biomedical ethics,’ 2. Many American commentators cite the 1914 New York case of *Schloendorff v. Society of New York Hospital*, 105 N.E. 92 as the doctrine’s first legal appearance, noting Justice Cardozo’s holding that every competent adult ‘has a right to determine what shall be done with his[sic] own body,’ (92) as having ‘kicked off a struggle to end millennia of physician nondisclosure and decisions for their patients’; Wolf (n 5), 1632.

<sup>308</sup> The 1972 U.S. case of *Canterbury v. Spence* (464 F.2d 772, D.C. Cir.) has been heralded by some scholars as ‘the pinnacle of informed consent case law’ given its determination that physicians would be held to a standard set by law; Wolf (n 5), 1632. This standard (later characterised as the ‘reasonable person’ standard) is informed by a ‘more robust right grounded in the moral principle of autonomy’ rather than a professional standard established by what similarly situated colleagues might disclose; R. Veatch, (ed) *Cross-Cultural Perspectives in Medical Ethics* (Jones & Bartlett 2000), 146. Veatch describes the *Canterbury* case as one which ‘overturn[ed] the more paternalistic Hippocratic professional standard,’ 158.

<sup>309</sup> Note, for instance, the critiques offered by Manson and O’Neill which reject autonomy models (in favour of frameworks for consent which prioritize ‘agency’ as a form of communicative action), while still recognizing the necessity of engaging with the discourse of autonomy in analyses of consent. They state: ‘Appeals to informed consent and its role in justifying clinical and research practice are now so well

demand for more explicit and expansive forms of consent, each aimed at providing patients with greater opportunities for ‘free choice.’ In a passage that echoes some of the tensions inherent in consent’s hypothetical status that were explored in Chapter One, Manson and O’Neill contend that:

Explicit consent cannot be necessary, because it is not always possible. Implied consent can be replaced by explicit consent in some, but not all, cases... [I]t would not be possible to do entirely without implied consent, because any explicit consenting presupposes and relies on implicit assumptions and agreements – including assumptions about the methods and conventions for requesting, offering and refusing consent.<sup>310</sup>

Thus, while the demand for more specific procedures and forms of consent is often viewed as raising ethical criteria for clinical practice, the effect is a demand for ‘formalistic, uniform, and, strictly speaking, impossible procedures and standards.’<sup>311</sup> Consent in this context is tasked with altering an age-old history of paternalism while securing patients’ personal and bodily integrity. As a result, medical law has increasingly granted an integral, if not all-encompassing, role to consent when determining the rights and responsibilities of medical relationships.<sup>312</sup> As noted by Draper and Sorrell, ‘[i]n comparison to what it asks of doctors, mainstream medical

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entrenched that their presence, indeed their necessity, and their justification are rarely questioned,’ (n 305), 2.

<sup>310</sup> Manson and O’Neill (n 305), 12.

<sup>311</sup> Manson and O’Neill (n 305), 11.

<sup>312</sup> In their 2007 volume, *Rethinking Informed Consent*, Manson and O’Neill point to empirical research highlighting the prominence of informed consent scholarship in the medical field. They cite their own search results from the database MedLine for the year 2002-2003 where the terms ‘informed consent’ appear in the titles of more than 300 articles (in English) and in the subject field of more than 1800 articles, (n. 305), 1. My own search of the same database for the year 2012-2013 reveals similar prominence for the terms with 244 (English language) articles with ‘informed consent’ in the title and 3383 articles where the terms are used in the Keyword field. These numbers increase substantially when a full year period is considered (i.e. given that a search of 2013 articles, at this time, surveys only a portion of the year). The number of (English language) articles available in the MedLine database for the year 2011-2012 which feature the terms ‘informed consent’ in the title and keyword field are 355 and 4567, respectively.

ethics makes very few demands of patients, and these usually begin and end with consent.<sup>313</sup>

Consent, therefore, in the modern context, is positioned as a simple matter of exercising choice or enacting a freedom each patient is presumed to have. Rethinking informed consent within this frame means tweaking the circumstances in which this choice occurs (e.g. revisiting the requirements for physician disclosure), rather than examining how this conception of consent prefigures the frame in which it is revisited or whether alternative accounts of the doctrine and its function might exist.<sup>314</sup> Consent as choice or self-determination gains an indisputable status in this narrative, linked to notions of freedom and personal rights. Yet, as Wendy Brown has argued, ‘rights are never deployed “freely,” but always within a discursive, hence normative context.’<sup>315</sup> This normative context, in terms of informed consent, is deeply entrenched in a liberal grammar of (patient) autonomy, thus making attempts to find understandings of medical consent which do not invoke and reinstate this rights-based foundation rather fruitless – at least in modern scholarship.<sup>316</sup> Hearing a different story will require a context that is situated before ‘autonomy’ became, to employ Foucault’s terms, ‘permanently established in the realm of truth.’<sup>317</sup>

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<sup>313</sup> H. Draper and T. Sorell, ‘Patients’ Responsibilities in Medical Ethics’ (2002) 16(4) *Bioethics* 335, 335.

<sup>314</sup> Manson and O’Neill suggest one such alternative account, proposing that ‘consent’ be viewed as a communicative transaction or ‘propositional attitude,’ although this still positions consent as a waiver of existing legal and ethical requirements – a point which Manson and O’Neill leave uncontested (n 305), 68-77.

<sup>315</sup> W. Brown, *Left Legalism/Left Critique* (Duke Univ. Press 2002), 422.

<sup>316</sup> Martin Pernick argues the debate between medical and legal values ‘derives from attempts to trace the history of “informed consent” as an isolated entity, abstracted from all social and historical context. But changes in medical technology, medical theory, professional power, and social structure all have interacted over time to shape the changing role of the patient in medical decisionmaking’; ‘The Patient’s Role in Medical Decision Making: A social history of informed consent in medical therapy,’ *President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, vol. 3: Making Health Care Decisions* (U.S. Library of Congress 1982), 3.

<sup>317</sup> Foucault (n 88), ix.



This chapter will thus continue the project's genealogical investigation of consent by examining a period far removed from the discourses of autonomy operating in contemporary bioethical scholarship – Europe's Middle Ages. Although the term the 'Dark Ages' has been largely abandoned by historians following the discovery of much intellectual and cultural development during the period, this label continues to be an apt description of the medieval era's reputation in the field of medical ethics.<sup>318</sup> This is even more so with respect to notions of patient autonomy or consent to medical treatment, given the general view of depravity which many medieval and medical historians have applied to medical practice of the time, leading some commentators to quip 'all medieval medical practice was malpractice.'<sup>319</sup> The period is further plagued by images of supernatural belief systems and charlatan practitioners. As one medieval history commentator suggests:

Because of their simple Christian faith, most medieval folk resorted for healing to saint's relics and superstitious charms. Furthermore, they were misled by medical quacks, old witches with their herbs and incantations, midwives, and blood-letting barbers. Such is the average mental image of medieval medicine.<sup>320</sup>

Yet, despite this reputation, a great number of ethical codes for medical practice and physician conduct within the medieval era exist, including what some scholars have suggested are 'consent forms.' Translations of these texts suggest they are contracts for medical treatment, each outlining a particular medical act to be performed by a named

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<sup>318</sup> MacKinney (n 82).

<sup>319</sup> M.P. Cosman, 'Medieval Medical Malpractice: The Dicta and the Dockets' (1973) 49(1) *Bulletin of the New York Academy of Medicine* 22. It should be noted that Dr. Cosman cites this phrase somewhat disparagingly before examining how erroneous a view of medieval medicine it is. See also Charles Singer, 'Medical Science in the Dark Ages' in Z. Cope (ed) *Sidelights on the History of Medicine* (Butterworths 1957); and John P. Riddle, 'Theory and Practice in Medieval Medicine' (1974) 5 *Viator* 157, who describes the demands of medical study as beyond the common medieval citizen: 'Scholastic or theoretical medicine was so voluminous, so rigorous to learn, so intricate to implement that it required the best minds, not the neighbourhood midwife, the old woodsman who could repair a broken bone of dog or man alike, or the leech who knew the herbs,' 183.

<sup>320</sup> MacKinney (n 82), 22.

physician.<sup>321</sup> Further, George Fort observed that the *Laws of Valentinus*, enacted in 368 A.D. marked one of the first appointments of a public surgeon who was paid by the state to administer to the poor, sparking a series of regulations over medical practice.<sup>322</sup> These regulations mark the state's forays into the governance of physician conduct, creating areas of liability and demarcating the correlative consequences for malpractice.<sup>323</sup> Further, these early allocations of medicine to a public domain of regulation fostered an interest in the profession's deontology, spurring many medieval theologians to examine the doctor-patient relationship and its ethical parameters. Contrary to popular characterisations of the period and its medical practices, consent figures prominently in many of these philosophical treatises, most notably in the work of medieval theologians, such as Thomas Aquinas and Nicolas de Cusa.

The following section attempts to track these discussions in pursuit of a different kind of story of consent. Similar to the skewed glance which the exploration of sexual consent in Antiquity provided, investigating the uses of consent in a period thought to precede concerns of patient autonomy by centuries should serve to disrupt the ease with which a consent-as-autonomy story can be read. The chapter contains four substantive sections. It begins with a descriptive overview of medieval medicine, including its educational schemes and forms of practice, focusing on the commanding influence (if not monopoly) that the Christian Church can be seen to have exercised over the field both in

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<sup>321</sup> Selek (n 83); and K. Ajlouni, 'History of informed consent' (1995) 346(8980) *Lancet* 980. Where the scholarship addresses these medical contracts, it does so through the lens of trade and commerce; see: G. Fort, *Medieval economy during the Middle Ages: A contribution to the history of European morals, from the time of the Roman Empire to the close of the fourteenth century* (J.W. Bouton 1883); and L. Farber, *An Anatomy of Trade in Medieval Writing: Value, Consent, and Community* (Cornell University Press 2006). This economic role of consent is discussed later in this chapter.

<sup>322</sup> The decrees of the Visigoths in 504 A.D. have also been noted as having moved medicine within the purview of "public health," thus creating a more formalised need to mediate the level of suspicion of the medical profession that was common during the period; Fort, (n 321), 139.

<sup>323</sup> Fort discusses a number of these regulations in detail, including those which prescribed death for physicians found in breach of their duty, (n 321). See also Cosman's study of medical malpractice cases during the 14<sup>th</sup> and 15<sup>th</sup> centuries in London, (n 319).

terms of regulating access to the profession and with respect to what knowledge would be deemed valuable enough to learn. This is in no small part attributable to a particular theological epistemology which ran deep throughout the Middle Ages, invoking a multitude of images of the ‘divine’ and supernatural forces to explain illness and the path to health. This relationship between science and faith, rationality and belief is the backdrop of this chapter’s second section, designed to provide a historically-specific frame within which to contemplate the medieval doctor-patient relationship and the role of consent within this. The discussion’s third section considers some other forums where consent figured in medieval thought, including cases of Christian conversion, marriage formation, and trade and commerce. These sources help to construct an understanding of consent as a form of submission (to God), made evident through a regime of self-management. This alternative understanding of consent is examined in the chapter’s fourth section where the implications of a conception of consent as an existential act of faith are explored. How this understanding might speak to the modern context is alluded to in the chapter’s conclusion.

### Medieval Medicine: A Monastic Enterprise

Before the heralded medical centres of Salerno and Chartres, the task of educating and employing physicians fell to monasteries. This was for both ecumenical and economic reasons. In the first instance, ministering to the sick was thought to represent a form of Christian charity. Both medical education and treatment were monopolized by the clergy with monastic infirmaries (which exclusively served members of the religious order) and cleric-run hospices (which treated ‘pilgrims’ and other ‘unfortunate souls’)

serving as the only forms of hospitals throughout much of the Middle Ages.<sup>324</sup> Disease was also understood as a divine intervention, a demonic or sinful presence in the body that only God might remedy.<sup>325</sup> Who better, then, to administer to the inflicted and decree successful treatment than those called to holy service?

Aside from the Christian ideal of brotherly love and a belief in the divine origin of disease, there were significant economic reasons for monasteries serving as the medieval centres of medical theory and practice. They were likely one of the few places of the period which would have had the necessary resources in materials, time, and skill both to undertake medical study and to compose one of the most valuable enterprises of both medical practice and ethics in the Middle Ages: the illuminated manuscript.

Described by some as ‘medical catechisms,’ these manuscripts were thought of as treatises of collected medical wisdom.<sup>326</sup> Produced in monasteries, given the resources such institutions were able to offer by way of time, money, and literacy, these medical texts outlined classical theories and illustrations of human anatomy, trusted plant and herbal sources for remedying known ailments, diagrams denoting known injuries and common surgical or cautery procedures, as well as guiding principles and techniques for diagnosis and treatment. These manuscripts offer a unique insight into the medieval medical world, particularly as woodcutting technology gained ground and the copying

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<sup>324</sup> MacKinney (n 82) is clear to note that these centres would hardly be recognized as modern-day hospitals and were quite prominent during the Merovingian period in France.

<sup>325</sup> As noted by Fort (n 321), 69:

Demoniacal aeons or emanations, portraying this diabolical principle of evil, were acknowledged to be the primitive source from which arose the multifarious elements of sorrow and pain, including earthly sufferings, pestilence among men, sickness, and other bodily afflictions, but inflicted with consent of Divinity, whose messengers they were.

<sup>326</sup> C.H. Talbot, *Medicine in Medieval England* (Oldbourne 1967), 73.

of such texts was made easier, improving their distribution (and signalling the move towards mass medical education.)<sup>327</sup>

More specifically, these manuscripts provide a means of understanding how both the study and practice of medicine in the Middle Ages were strongly controlled Christian domains. This dominion can be seen on at least three levels, namely: (i) exclusive access to medical education; (ii) an imposed (and hierarchical) dichotomy between medical theory and its practice; and (iii) a process of de-paganization of source material. Each of these is examined in greater detail in the following sub-sections.

(i) *Regulating Access*

The first means by which the Church exercised control over medieval medicine was in a stringent regulation of access to the profession. Aside from the obstacle of literacy, aspiring physicians who wished to become educated in the art of medicine had to do so under the tutelage of monks or other clerics. Admission to the medical profession thus came with a number of ‘Christian’ requirements, including enforced celibacy and prohibitions against marriage.<sup>328</sup> Some commentators have suggested that the anomic conditions that were characteristic of the Middle Ages created a habitual practice of persecution against non-Christian groups in an attempt to secure the ‘power and influence of a literate élite.’<sup>329</sup> The Catholic Kings of 15<sup>th</sup> century Spain, for instance, created laws which required evidence of ‘purity of the blood’ for all those who wished to learn or practice medicine, effectively prohibiting all non-Christians (and their

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<sup>327</sup> Peter M. Jones marks this move more specifically with the publication of Vesalius’ texts *De humani corporis fabrica* and *Epitome of Defabrica*, both published in 1543: Jones, *Medieval Medicine in Illuminated Manuscripts* (British Library 1998).

<sup>328</sup> Ecclesiastical sanction for marriage was given to physicians in 1451; Fort (n 321).

<sup>329</sup> J. Arrizabalaga, ‘The Ideal Medical Practitioner in Counter-Reformation Castile’ in S. Kottke and L. G. Ballester (eds), *Medicine and Medical Ethics in Medieval and Early Modern Spain* (Magne Press 2009), 62.

descendants) from entering the profession.<sup>330</sup> These and similar regulations both established and relied upon prevailing understandings of the ‘ideal physician,’ one which was certainly male, Christian,<sup>331</sup> and university or monastically trained.<sup>332</sup>

(ii) *Prioritizing Theory over Practice*

In addition to the regulation of access to medical education, the Church also exercised control over the medieval medical field at an epistemological level, authorising both eligible ‘knowers’ and sources for what was ‘known.’ While monasteries served as the primary sources for medical education, this instruction was largely a theoretical enterprise which promulgated disdain for the uneducated practitioner.<sup>333</sup> The more practical components to medicine were given a dishonourable status following a decree of the Lateran Council in 1215 which forbade clerics from all major Orders to engage in the ‘base’ activities of cautery and surgery.<sup>334</sup> This left those interested in the medical field’s more technical components largely to their own devices. As MacKinney puts it, ‘[i]f a young man chose to perfect himself in the medical art, he must find an expert.’<sup>335</sup> Thus, practical knowledge was gained outside of monasteries through systems of apprenticeship. This did little to help the already suspicious reputation medical practitioners had during the era. Aside from links which the general populace drew

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<sup>330</sup> Arriabalaga (n 329).

<sup>331</sup> Arrizabalaga suggests this ideal physician was more specifically Roman Catholic, although this is attributable to the historical context his research focuses on, i.e. Counter-Reformation Castile and 16<sup>th</sup> century Spain; (n 329).

<sup>332</sup> Even when surgical instruction was first introduced into an institutionalized setting (in Salerno during the 13<sup>th</sup> century) a distinction was drawn between those who studied medicine and those who practiced it, the latter referred to as ‘medici manuales,’ i.e. physicians who used their hands; William of Saliceto, 1275 as cited by Jones (n 327), 86.

<sup>333</sup> Riddle cites Karl Sudhoff (described by Riddle as ‘the father of the history of medicine’) as having furthered this derision of the medieval medical practitioner even among his modern students, one of whom quotes him as saying, ‘All medicine practiced by laymen is only thievery from the All-Mother Medicine’; Riddle (n. 319).

<sup>334</sup> Talbot notes that in some of the northern regions of Italy which could be characterised as more secular, the teaching of surgery did occur in some university programs but it was rare and difficult to confirm in existing evidentiary sources; (n 326), 81.

<sup>335</sup> L. MacKinney, *Early Medieval Medicine* (John Hopkins Press 1937), 122.

between the medical profession and superstitious or ‘quack’ practices, the scarcity of available training forced many practitioners to travel in order to apprentice and learn within the trade, resulting in a ‘foreigner’ status that came to be distrusted among medieval societies.<sup>336</sup>

The period’s illuminated manuscripts also provide evidence of medical theory’s primacy over its clinical applications.<sup>337</sup> They served to familiarise readers with accepted bodies of knowledge while delegitimizing other forms of medical conduct. Users of the manuscripts would have had to have been learned, which many practitioners, such as blood-letters, surgeons, barbers, or apothecaries were not. Further, many of the remedies administered during the period would have employed supernaturally sourced remedies or pagan rituals, yet these find no place amidst the manuscripts copied by the same scholars who produced prayer books and bibles.

MacKinney observes:

Inasmuch as clerical writers were chiefly interested in religious healing, they gave no details concerning medical practice. An occasional reference to medicines, cauterizing, surgery, and cupping glasses and sponges for blood-letting is about all. Churchmen made little reference even to the simplest instruments which would be necessary to the surgeon.<sup>338</sup>

This disjuncture between the way medicine was authorised to be studied by the Church and the means by which it was practiced is found not only in the images offered in these illuminated manuscripts but also in the languages in which they were written. The introduction of medieval vernacular languages into written form, particularly in the

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<sup>336</sup> D. Margalith, ‘The Ideal Doctor as Depicted in Ancient Hebrew Writings’ (1957) 12 *Journal of the History of Medicine* 37. MacKinney notes that these ‘practitioners of a lower sort’ to whom the ‘general populace’ resorted were called *harioli*. He cites a passage from Gregory de Tours, mentioning ‘the rustic custom of resorting to “sorcery, potions, and the *ligamenta* of the *harioli*”’; MacKinney (n 335), 71; citing Tours’ *De Miraculis Sancti Martini*, I, 26.

<sup>337</sup> Jones is clear to note, however, that such a division is a modern classification of the medical field and would not have been found (explicitly) in these medieval manuscripts; (n 327), 28.

<sup>338</sup> MacKinney (n 335), 73.

areas of science and medicine during the fourteenth and fifteenth centuries, demonstrate the ways in which clinical knowledge was subordinate to the more theoretical pursuits of the Church.<sup>339</sup> Prior to the written vernacular, all specialised or professional texts had been composed in Latin, allocating the emerging English language texts to a second-class status. As the vernacular gained written ground, medical practitioners were able to engage in the composition of medical ‘literature,’ collecting what might be thought of as ‘best practices’ guides to sit alongside the more scholarly works of medical theory. Scholars of both the medieval and modern period were quick to draw a distinction between these collections (described in the literature as ‘anthologies’) and the more scholastic manuscripts employed in a curricular fashion within monasteries.<sup>340</sup> The latter collection was referred to as the *Articella* and consisted of a series of short texts which were adopted as an official curriculum by many existing universities in France and Italy by the end of the twelfth century.<sup>341</sup> These included Galen’s *Isagoge* (outlining his theory of humours) and Hippocrates’ texts, *Aphorisms*, *Prognostics*, and *Regimen in acute diseases*, among others.

### (iii) *Christian alignment of Ancient sources*

This practice of vesting epistemological authority in early Greek, Roman, and Arab writers could not have been without its theological difficulties for the medieval scholar of medicine. The endorsement of Galen, one of the second century’s most prominent physicians, among monastic medical writers, for instance, is incongruous on many

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<sup>339</sup> L. E. Voigts, ‘Multitudes of Middle English Medical Manuscripts, or the Englishing of Science and Medicine’ in M. R. Schleissner (ed) *Manuscript Sources of Medieval Medicine* (Garland Press 1995). Riddle (n 319) also suggests that this disregard for the clinical applications of medicine was present in the choices made by translators of Greek and Arab texts to include the more philosophical or theoretical works while omitting the practical ones.

<sup>340</sup> F. Wallis, ‘Signs and Senses: Diagnosis and Prognosis in Early Medieval Pulse and Urine Texts’ (2000) 13(2) *Social History of Medicine* 265.

<sup>341</sup> Talbot (n 326).



levels given his beliefs in polytheism, his views on the human soul as tripartite, and Galen's own criticism of the 'intellectual failings of the Christians.'<sup>342</sup> Some of his works (such as his statements on visual perception) were even labelled as heresy and rejected by members of the medical community in the twelfth and thirteenth centuries.<sup>343</sup> And yet, his and other works from the Classical period maintained an authoritative status within medical theory. In fact, departing from these early treatises was regarded as a sign of uneducated and unskilled medical practice. Observing the enactment of medieval laws aimed at regulating the medical profession, George Fort notes, 'the cause alleged for this stringent law is a positive attestation of the debased condition of the medical men of the period, who apparently preferred to wander from the footsteps of Hippocrates and Galen.'<sup>344</sup> As such, much effort appears to have been taken to move Galen and his works away from the perception of paganism toward a more Christian ideal – a task largely left to the clerics engaged in copying and translating his works in the illuminated manuscripts. Few biographical accounts of Galen can be found in these medieval texts and they are often vague if not ambiguous when they do appear, thus preventing his exclusion from Christian ideals. In some instances, Galen is presented as a contemporary of Christ, having heard about his miracles of healing and travelled to learn more of the healing art from him.<sup>345</sup>

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<sup>342</sup> V. Nutton, 'God, Galen, and the Depaganization of Ancient Medicine' in P. Biller and J. Ziegler (eds) *Medicine and Religion in the Middle Ages* (York Medieval Press 2001), 19.

<sup>343</sup> F. Salmón, 'Academic Discourse and Pain in Medical Scholasticism (Thirteenth and Fourteenth Centuries)' in Kottek and Ballester (n 329).

<sup>344</sup> Fort (n 321), 139.

<sup>345</sup> Salmón (n 343), 43; citing Mondini de'Liuzzi lectures in Bologna in 1317. Other accounts include Galen conversing with Mary Magdalene, or learning 'all he knew about women from Cleopatra'; Nutton (n 342) citing a 10<sup>th</sup> C. Arabic biography of Galen by al-Mubassir ibn Fatik. Nutton also suggests a number of other factors which contributed to Galenic medicine's acceptance in Christian medical frameworks, including Galen's persuasiveness as a rhetorician and his prolific writing career and success at seeing these works disseminated at a time when such intellectual endeavours were increasingly sparse.

This suggests that the Church-imposed hierarchy of the theoretical study of medicine over its practice in the medieval era did not serve a scholarly purpose so much as a deontological one. Allaying the moral theories which would guide the choices of physicians and patients with Christian ideals was imperative and, at times, explicit. Aside from merely copying and including early Greek authorities, their placement and characterisation within these early treatises suggests attempts to ‘Christianise’ them or at least bring them into accord with the Church’s ideals.<sup>346</sup> The image of the Hippocratic Oath offered in Figure 3.1 (below) taken from the 12<sup>th</sup> century demonstrates this rather overtly, given its rendering in the form of a cross.<sup>347</sup>



**Fig. 3.1:** 12<sup>th</sup> century Byzantine manuscript, *Folio Biblioteca Vaticana*, as reproduced in I. M. Rutkow, *Surgery: An Illustrated History* (Mosby-Year Book 1993), 27.

The dominant place and authority the works ascribed to Hippocrates enjoy in medieval medical treatises is itself an interesting example of this practice of Christian alignment. Nutton has observed that the Oath, which begins with an invocation to Apollo and other Greek gods, was often copied with Christian revisions, replacing these pagan phrases

<sup>346</sup> MacKinney notes that despite the explicit condemnation of ‘pagan’ medicinal practice by the Church, many medieval folk healers continued to employ traditional methods (many of which called upon supernatural or ‘magical’ powers and properties); however, these were often performed ‘under cover of Christian prayers and often with the sign of the cross’ (n 335), 29.

<sup>347</sup> Nutton notes three manuscripts where the Oath is reproduced in this form; (n 342), 26.

with obligations more akin to Christian theology.<sup>348</sup> Ludwig Edelstein has also noted that the Oath's prohibitions on suicide and abortion were atypical of Classical Greece which did not censure either act until the advent of Christianity at the turn of the first century.<sup>349</sup> These historical incongruities prompted Edelstein to suggest the Oath was a Pythagorean document – a position that is not without its critics.<sup>350</sup> Yet, the argument does provide a possible explanation for the enduring authority of the Oath given how well the doctrines of Pythagoreanism align with those of Christianity.<sup>351</sup>

The prominence of Galen and his work in many of these early manuscripts may also be attributable to how well his theory of humorism could be employed as an authority for the Christian view of the human passions and the need to keep them well managed. Galen posited the body as made up of four substances or 'humors,' each corresponding to different fluids in the body, (i.e. black and yellow bile, phlegm, and blood) which might wax and wane, depending on diet and activity.<sup>352</sup> When a patient was suffering from a surplus or imbalance of one or more fluids, then his or her personality and physical health would be affected. Health was attained through 'complexion,' the Latin term for the Greek word 'crasis,' meaning a balanced temperament, one not upset by the list of 'non-naturals' Galen identified as correlative to disease, such as food and drink,

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<sup>348</sup> Nutton (n 342).

<sup>349</sup> L. Edelstein, 'The Hippocratic Oath' in O. Temkin and C. L. Temkin (eds) *Ancient Medicine: Selected Papers of Ludwig Edelstein* (Johns Hopkins Press 1967). Abortions were prosecuted in antiquity, however, when the father's right to an heir had been violated, echoing some of the issues raised in the last chapter on sexual consent and its role in guarding patrilineage.

<sup>350</sup> For a charitable but alternate reading of Edelstein's view, see O. Temkin, 'What Does the Hippocratic Oath Say?' in *On Second Thought' and other essays in the history of medicine and science* (John Hopkins Press 2002).

<sup>351</sup> Life, for instance, was viewed by Pythagoreans as 'a post to be held and defended' to which a person had been divinely appointed. For most of the ancient Greeks, no notion of an immortal soul for which a subject might be held accountable to a divine creator was espoused, rather a multiplicity of gods (each with human failings) could intervene and disrupt human life but not judge it in any eternal sense. The Hippocratic Oath also lists a series of dietary measures which a physician ought to oversee for the 'benefit of the sick' and to 'keep them from injustice' (Edelstein's translation). For Edelstein, this is further evidence of the Oath's Pythagorean origins given the strict dietary and behavioural regiments endorsed by that school of thought; (n 349).

<sup>352</sup> O. Temkin, *Galenism: Rise and Decline of a Medical Philosophy* (Cornell Univ. Press 1973).

passions, emotions, and ‘accidents of the soul.’<sup>353</sup> Galen and his works make frequent appearances in these early medical manuscripts despite the diminutive clinical benefit his theories would have provided the medieval world. The copying and re-writing of his texts did not serve to advance medical knowledge. It was repetitive and often in conflict with advancements in anatomy or surgery of the day and so poses as an interesting example of this process of Christian alignment or ‘depaganization,’ to borrow a term from Vivian Nutton. As Nutton puts it:

[T]he take-over by the later Middle Ages of Galenic-Hippocratic medicine [is not] a story of the triumph of scientific truth over religious obscurantism. Hippocrates was no Copernicus, Galen no Galileo. The effectiveness of Galenic-Hippocratic therapeutics was hotly disputed in the Classical World... the most popular works among the Carolingians represented a much more practical, non-theoretical type of medicine... Galenic medicine was far from being the obvious choice it might seem to us, and its eventual triumph owed not a little to its compatibility with Christian, Muslim, and Jewish theology.<sup>354</sup>

This de-paganization or re-alignment of medical authorities from antiquity served to create an exclusively Christian ethic for both medieval medicine’s practice and its intellectual history.<sup>355</sup> ‘To the Greeks of mediaeval Byzantium, Hippocrates and Galen had become almost divine, worthy of being commemorated in fresco alongside patriarchs and prophets as heralds of Christian truth.’<sup>356</sup> Coupled with a system of social and epistemological stratification on the basis of (monastic) theory and practice, a

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<sup>353</sup> N. G. Siraisi, *Medieval and Early Renaissance Medicine: An Introduction to Knowledge and Practice* (Univ. Chicago Press 1990), 101.

<sup>354</sup> Nutton (n 342), 19.

<sup>355</sup> As one historian, commenting on a 4<sup>th</sup> century letter of advice (which makes explicit reference to the Hippocratic Oath) sent by St. Jerome to an Italian priest regarding a cleric’s medical duties, notes:

In citing the *Oath*, Jerome’s purpose was rather to give weight to his counsels to the priest by invoking the support of an ancient authority. His choice of a pagan medical authority was nothing new. It was not the first time Christians had borrowed from the classical medical tradition and its ideals. Christ himself had often been described as the Physician since the earliest Christian times. And the Church Fathers made extensive use of medical similes and metaphors to describe Christ’s works. Indeed, given the affinities existing between ancient medical ethics and Christian morality,” it is difficult, and perhaps even pointless, to attempt to identify such borrowings when they in fact occurred ; C. Galvão-Sobrinho, ‘Hippocratic Ideals, Medical Ethics, and the Practice of Medicine in the Early Middle Ages: The Legacy of the Hippocratic Oath’ (1996) 51(4) *J. Hist. Med Allied Science* 438,441.

<sup>356</sup> Nutton (n 342), 5.

‘canon’ of medieval medicine begins to emerge that takes form within a Christian framework. What, then, is this canonical story of consent?

Perhaps predictably, this narrative is not one of autonomy, but submission. There was a prevailing understanding in the Middle Ages of disease as a divine intervention, resulting in an ethic of self-care borrowed from the Ancient period, where the virtue of balance was preferred to the errors of excess. Within a context where physicians were viewed as agents of the divine, consent was the means by which patients might align themselves with God in the hopes of attaining good health. To aid in uncovering this medieval understanding of consent, the next section examines the medieval doctor-patient relationship in further detail, including the relevant legislation and ethical codes of the period. How this scheme and its participants informed medieval uses of consent is explored in Section III.

### Medieval Doctors and their Patients: A match made in heaven

Very little has been written about the doctor-patient relationship in the Middle Ages, an oversight which has elicited comment among both medieval and medical historians.<sup>357</sup>

Determining how the medieval physician practiced medicine and the ethical principles which guided these routines is thus a kind of patchwork project, assembling the various texts and images of the period to form as clear a picture as history may allow. Certainly, the early legislative schemes of the Romans and later the Visigoths at the turn of the sixth century serve as a reasonable backdrop given their influence on much of the

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<sup>357</sup> See, for instance: L. Garcia-Ballester, ‘Ethical Problems in the Relationship between Doctors and Patients in 14<sup>th</sup> Century Spain: On Christian and Jewish Practitioners’ in Kottek and Ballester (n 329); and L. Brockliss, ‘Review of L. Conrad, et. al., *The Western Medical Tradition: 800 B.C. to AD 1800*’ (1997) 41(4) *Medical History* 510.

medieval era's approach to medical licensing and regulation.<sup>358</sup> The Romans awarded a number of privileges to doctors who agreed to live within the city limits, including rights of citizenship and some tax exemptions.<sup>359</sup> Yet, Roman society had a scattered scheme of medical licensing with few formal restrictions on who could practice medicine or any clear delineation of what requirements were needed to do so. Any number of unskilled persons might enjoy the privileges of the *medici* without any of the training.<sup>360</sup> The *Lex Visigothorum* arose as a response to this lack of medical regulation under the Roman empire. These laws stipulated the requisite conduct for practising physicians, including a number of prohibitions specifically aimed at regulating the doctor-patient relationship. Under the *Lex I Antiqua*, for example, physicians were not permitted to cup or bleed a free or nobly born woman without the presence of her legal guardian or to visit any female patient in her home without a family chaperone.<sup>361</sup> Doctors were also disallowed, under the *Lex II Antiqua*, from entering any prison without official accompaniment so as to prevent the physician from dispensing euthanizing drugs.<sup>362</sup> These decrees are largely understood among social and medical historians as having launched, in general, a 'new epoch in legal history' and more particularly, a contract model for doctor-patient relationships. This is made explicit under the third set of regulations in the Code, *Lex III Antiqua*:

If anyone should request that a physician treat him for a disease or cure his wound under contract, when the physician has seen the wound or diagnosed the

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<sup>358</sup> The Laws of Valentinus (368 A.D.) resulted in the appointment of a public surgeon and a charitable mandate for doctors to treat patients irrespective of their financial circumstances; Fort, (n 321).

<sup>359</sup> Physicians were also among the groups exempt from expulsion during periods of famine under Augustus' rule; D. Amundsen, 'Visigothic Medical Legislation' (1971) 45(6) *Bulletin of the History of Medicine* 553; T.G. Sistrunk, 'The Function of Praise in the Contract of a Medieval Public Physician' (1993) 48 *Journal of the History of Medicine and Allied Sciences* 320.

<sup>360</sup> Sistrunk notes the presence of a concept of negligence in Roman law (*culpa*, as he cites it) which could be used to seek compensation from physicians who had warranted they had the requisite skill to complete a task but, in effect, did not, (n 359).

<sup>361</sup> *Lex Visigothorum*, Book XI, De Medicis et Aegrotis (*Rec. Hist. Fr.*, IV: 434), as cited in MacKinney, (n 335), 174.

<sup>362</sup> Fort (n 321).

illness, immediately he may undertake the treatment of a sick person under conditions agreed upon and set forth in writing.<sup>363</sup>

Some of these medical contracts have survived, revealing a practice of naming the physician, the patient, the relevant risks and/or liabilities of the procedure, as well as lists of any witnesses to the contract.<sup>364</sup> The introduction of a contractual relationship between doctor and patient was accompanied with a set of rather stringent punishments addressing malpractice, ranging from fines to death depending on the social status of the patient (where ‘malpractice’ was often inferred from unsuccessful, rather than negligent, treatments).<sup>365</sup>

These legal frameworks, however, provide only one view of the medieval doctor’s practice. The physician understood medicine as imposing certain obligations on him, where the ethical principles which might guide this duty were directly derived from not simply his daily practice, but the belief systems of the social world in which it took place. As such, the medieval story of disease as a divine act looms large in these codes aimed at regulating the doctor-patient relationship. Sickness was believed to be the consequence brought upon by persons who had led sinful or unbalanced lives.<sup>366</sup> Here, the physician’s role was merely one of mediator. ‘Sufferers could be ministered to and their pain eased, but healing must perforce be left to God or nature.’<sup>367</sup> Further, such

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<sup>363</sup> Translation by Amundsen (n 359), 559.

<sup>364</sup> Selek (n 83).

<sup>365</sup> Fort cites an example from 582 A.D. where an ancient Teutonic law authorized the kinsmen of nobles to ‘pass judgment upon the medical attendant of a defunct,’ putting them to death where deemed fit. Such was the fate of the physician to Austregild, the Duchess of Burgundy, who was killed following his Lady’s death to a 6<sup>th</sup> century plague (n 321), 350. Amundsen, however, suggests that such acts of retribution ‘in kind’ were limited and that most of the punishments under the *Lex Visigothorum* were ‘relatively mild for the times,’ (n 359), 561. The Code of Hammurabi, for instance, dictated that any surgeon under whose care a patient dies should have his hand cut off.

<sup>366</sup> Some commentators debate whether the medieval view of disease as a consequence for sin was attributed to individual acts or humans in general (following the Fall). See, for instance, Siraisi (n 353), particularly Chapter One.

<sup>367</sup> MacKinney (n 335), 75.

healing was unlikely to come where patients refused to submit to God's will and (re)align themselves with the 'good' life, devoid of excess and sin. The 'caladrius,' pictured below in Fig. 3.2 is an interesting symbol of this view.<sup>368</sup> Represented as a mythical white bird, the caladrius is thought to have made its first appearance in the second century text, *Physiologus*.<sup>369</sup> Such accounts suggest the bird would visit the sick, pre-telling the patient's prognosis. If the bird looked at the patient, she could expect to recover. If the bird looked away, she would not. The description of the bird in the *Physiologus* remarks on these healing attributes:

There is another kind of flying animal called the charadrius mentioned in Deuteronomy which is entirely white with no black part at all. His excrement is a cure for those whose eyes are growing dim and he is found in the hall of kings. If someone is ill, whether he will live or die can be known from the charadrius. The bird turns his face away from the man whose illness will bring death and thus everyone knows that he is going to die. On the other hand, if the disease is not fatal, the charadrius stares the sick man in the face and the sick man stares back at the charadrius, who releases him from his illness. Then flying up to the atmosphere of the sun, the charadrius burns away the sick man's illness and scatters it abroad.<sup>370</sup>

Medieval manuscripts often associate the caladrius with Christ, particularly in marginal decorations of manuscript illustrations.<sup>371</sup> Thus, if the patient was 'aligned' with Christ, able to engage in a reciprocal glance with the divine, balance would be restored and healing would ensue. If, however, the patient could not return the glance, could not 'see eye to eye' with Christ, redemption was lost.

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<sup>368</sup> This bird is also sometimes referred to as 'Charadrius' in the literature, see: Earle Hackett, 'The Charadrius: A Useful Bird' (1955) 30(11) *Irish Journal of Medical Science* 491; or 'Karadrios,' see J. Schnier, 'The Symbolic Bird in Medieval and Renaissance Art' (1952) 9 *Book of Psychoanalysis* 292.

<sup>369</sup> M.J. Curley (tr), 'On the charadrius' in *Physiologus* (Univ. of Texas Press, 1979), as cited in J.L. Couper, 'The Healing Bird' (1990) 78 *South African Medical Journal* 485.

<sup>370</sup> Curley (n 369), 7-9.

<sup>371</sup> Jones (n327).





**Fig. 3.2:** Caladrius pictured from a 13<sup>th</sup> century French manuscript (author unknown) Bibliothèque Nationale de France, lat. 14429, Folio 106v.

The medieval physician was understood to be tasked with overseeing this balancing act. Bloodletting, for instance, was a treatment based on an understanding of the human body as a hydraulic system with the doctor serving to ‘fine-tune’ the body’s fluids.<sup>372</sup> The story of an eleventh century physician known only by the signature, ‘John, physician’ (which he left on a document in 1046), alludes to the doctor’s role as monitor of the human passions. MacKinney describes John as one of King Henry I of France’s personal physicians who garnered ‘chief fame... from the fact that he lost an important case (no less a personage than his royal master), without losing his own reputation or life.’<sup>373</sup> MacKinney, using two separate accounts of the incident, describes John as having given the king a purgative with strict instructions not to drink anything immediately afterwards. The king disobeyed and died the following day. Despite a suggestion of physician error (in delivering an overdose of purgative), John is said to have ‘escaped with a nickname, “the deaf,” to remind him of his failure to detect the king’s violation of orders in time to avert fatal results.’<sup>374</sup>

<sup>372</sup> Galen’s theory of humours within the human body would have served as the context for this understanding; Jones (n. 327), 95.

<sup>373</sup> MacKinney (n 335), 143-144.

<sup>374</sup> MacKinney (n 335), 144.

This depiction of a requirement in medieval physicians to ‘hear’ the internal desires of patients suggests doctors were expected to have a heightened level of knowledge or awareness than the average person. Moreover, as some of the discussion in the following section highlights, knowing the truth of another’s ‘inner will’ was a matter thought to belong to God alone (despite the practical difficulties this elusiveness brought to theologians, jurists, and political theorists).<sup>375</sup> MacKinney notes a sixth century letter used for the (royal) appointment and instruction of the Ostrogothic regime’s public doctors which reads in part:

The physician helps us when all other helpers fail. By his art he finds out things about a man of which he himself is ignorant; and his prognosis of a case, though founded on reason, seems to the ignorant like a prophecy.<sup>376</sup>

The medieval physician, then, was expected to have some level of transcendent or perhaps ‘divine’ knowledge given the number of sources which depict doctors as appointed by God. The first known ethical treatise for the doctor-patient relationship, titled ‘Practical Ethics of the Physician,’ was composed by Ishāq ibn ‘Alī al-Ruhāwī, an Arab scholar writing in the ninth century.<sup>377</sup> The text describes the doctor as an agent of Allah, the ‘real physician,’ leaving the ‘ethic of the physician [as] an extension of that of a religious man serving his Creator.’<sup>378</sup> St. Augustine made the same claim,

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<sup>375</sup> It is also interesting to note that this ‘unknowability’ of the inner will was acknowledged explicitly by John Locke, leading him to employ tacit consent as a form of compromise; see Chapter One, *infra* text, n. 197.

<sup>376</sup> Cassiodorus, *Variae*, VI: 19 (M.G.H. Auctores Antiqui, XII); as cited in MacKinney (n 335), 47.

<sup>377</sup> This is, of course, the English translation of al-Ruhāwī’s text, ‘Adab al-tabib’ offered by M. Levey ‘Medical Ethics of Medieval Islam with special reference to al-Ruhāwī’s “Practical Ethics of the Physician”’ (1967) 57(3) *Transactions of the American Philosophical Society* 1. Levey (at 8) suggests ‘it is also known that al-Ruhāwī was a Christian and compiled two works on Galen,’ although this knowledge has been questioned by some scholars, see: Sahin Aksoy, ‘The Religious Tradition of Ishaq ibn Ali al-Ruhāwī: The Author of the First Medical Ethics Book in Islamic Medicine’ (2004) 3(5) *Journal of the International Society for the History of Islamic Medicine (JISHIM)* 9.

<sup>378</sup> M. Levey, ‘Medical Deontology in Ninth Century Islam’ (1966) Oct. *Journal of the History of Medicine* 358, 366, (citing Al-Ruhāwī’s Adab al-tabib MS, fols. 80a). Al-Ruhāwī also calls physicians the ‘guardians of souls and bodies,’ emphasising the qualities needed in a good physician. In his view, Allah would not choose anyone for the task, but rather only ‘the foremost of the people in station, highest in rank, greatest in worth, and most truthful in speech’ (fols. 70b-71a), as cited by Levey (n 377), 14. Al-

positioning Christ as the ‘true physician’ of souls and bodies.<sup>379</sup> Many medieval manuscripts contain comparable contentions, including translations of the Hippocratic Oath which suggest physicians must administer to both body and soul.<sup>380</sup> Similarly, MacKinney cites an eighth century manuscript which employs excerpts from the work of Pope Gregory I, Isidore of Seville, and the Bible to associate medicine with a deific purpose.<sup>381</sup>

This view of the doctor as a divine agent is a marked departure from the physician of Greek antiquity, whose calling and motivations were viewed as purely humanitarian. Understood as the genesis of the model of the doctor-patient relationship of beneficence, the physician of antiquity was motivated by *philanthropia*, or a ‘love of humanity’ as a means of finding personal fulfilment or the ‘good life.’<sup>382</sup> In this context, the physician and patient were mutually engaged in the medical act, albeit for different ends. Katz contends that while *philanthropia* served as the doctor’s motivation, the patient’s interest could be kindled with the physician’s success at curing what ailed them, understood as *philotechnia*, or love of the medicinal art.<sup>383</sup> The Hippocratic essay, ‘On Precepts’ reflects this when it suggests ‘where there is love of man, there is

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Ruhāwī suggests this ‘divine’ appointment removes the requirement for any physician to swear by an oath prior to being able to practice, as Allah or God would only select candidates already worthy.

<sup>379</sup> Siraisi (n 353), 9.

<sup>380</sup> Edelstein (n 349), 35.

<sup>381</sup> ‘Wherefore let us honor the physicians so that they will help us when sick, remembering [the word of] that wise one [Ecclesiasticus 38:1 Vulgate]: “Honor the physician of necessity for the Most High created him... The Most High created medicine from the earth, and the prudent man will not reject it.”’ (MacKinney’s translations, n. 82, 5).

<sup>382</sup> K. B. Jones, ‘Surgeons’ Silence: A history of informed consent in orthopaedics’ (2007) 27 *Iowa Orthopaedic Journal* 115, 116.

<sup>383</sup> J. Katz, ‘The Regulation of Human Experimentation in the United States – A Personal Odyssey’ (1987) 9(1) *IRB: Ethics and Human Research* 1.

also love of the art.’<sup>384</sup> This changed with the Middle Ages and the advent of Christianity’s influence on medicine and its practice. As Jones notes:

In medieval times, divine authority replaced *philanthropia* as the doctor's contribution to the physician-patient unity of will. Faith replaced *philotechnia* as the patient's contribution. The typical routine prior to surgery included the laying out of instruments, prayer with the patient, and finally the technical process of care.<sup>385</sup>

This, again, highlights the religious backdrop of the medieval doctor-patient relationship. If physicians and their patients understood themselves as engaged in a ‘unity of the will’ as a result of faith and divine authority, where does this leave consent, the ‘lynchpin’ of the modern era’s medical ethics? The following section examines this inquiry in greater detail, exploring the medieval era’s canonical story of consent. It includes a brief epistemological analysis of the basic structures of medieval ways of knowing and how these served to establish ‘authorized knowers.’ How this epistemological structure influences how ‘consent’ was understood and enacted in the medical practice of the Middle Ages also forms part of the ensuing discussion.

### Medieval Consent: ‘The way, the truth, and the life’

When consent appears in medieval medicine, it does so tacitly. Henri de Mondeville, a fourteenth century surgeon cautioned physicians against proceeding with a treatment which the patient’s family did not endorse or to which the patient was violently opposed, suggesting some consideration of a patient’s wishes.<sup>386</sup> Many illustrations within medieval medical manuscripts depict the patient as an active participant in

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<sup>384</sup> Ch. VI, as translated by L. Edelstein in ‘The Professional Ethics of the Greek Physician’ (1956) 30 *Bulletin of the History of Medicine* 391, 392.

<sup>385</sup> Jones (n 382), 116.

<sup>386</sup> Mondeville’s suggested motive, however, for avoiding such ‘unfortunate cases’ where patients refuse treatment was for the preservation of the physician’s good reputation (and thus livelihood). See: M.C. Welborn, ‘The long tradition: A study in Fourteenth Century Medical Deontology’ in C. Burns (ed), *Legacies in Ethics and Medicine* (Science History Publications 1977); Sistrunk, (n 359); and E.A. Hammond, ‘Incomes of Medieval English Doctors’ (1960) XV(2) *J. Hist. Medicine* 154.

medical procedures, such as holding a urine flask for the physician's analysis or carrying a cupping vessel during instances of bloodletting.<sup>387</sup> This could suggest some level of implicit consent in the medieval doctor-patient relationship. And some scholars have argued that a model of consultation and joint decision-making within doctor-patient relationships was endorsed in Ancient Greece.<sup>388</sup> However, there are far more explicit statements which seemingly speak against a consideration of the patient's will in the medieval doctor-patient relationship. The majority of these are found within the context of medicine's divine story which foretold a patient's cure only alongside a patient's obedience to the physician's instructions. As Mondeville wrote:

The surgeon... should promise that if the patient can endure his illness and will obey the surgeon for a short time he will soon be cured and will escape all of the dangers which have been pointed out to him; thus the cure can be brought about more easily and more quickly... If the patient is defiant, seldom will the result be successful.<sup>389</sup>

Faden and Beauchamp identify Mondeville's statements as exemplifying the beneficence model of doctor-patient relations, attributing to Mondeville the belief that 'the maintenance of hope [is] of sufficient therapeutic benefit to justify deception.'<sup>390</sup> Certainly, outright deception is found in many medieval codes of conduct although few in as colourful a language as Mondeville offers, counseling doctors to keep up patients'

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<sup>387</sup> Jones (n 327).

<sup>388</sup> In Book IV of Plato's *The Laws*, he describes the differences between relationships among slave-physicians and their slave-patients and the doctor-patient relationship 'befitting of free men.' In the latter case, the physician discusses 'things thoroughly from the beginning in a scientific way and takes the patient and his family into confidence. Thus he learns something from the sufferers.... He does not give prescriptions until he has won the patient's support, and when he has done so, he steadily aims at producing complete restoration to health by persuading the sufferer into compliance'; A.E. Taylor (tr), Plato, *The Laws* (Dent, London 1934), 104-105, as cited in M. Siegler, 'Searching for Moral Certainty in Medicine: A Proposal for a new model of the doctor-patient encounter' (1981) 57(1) *Bulletin NY Academy of Medicine* 56, 68. Siegler goes on to suggest Plato's comments model a 'fully human relationship' between doctor and patient, 'in which technical aspects of care are placed in the context of an appreciation for the most widely construed interests of each'; 68.

<sup>389</sup> E. Nicaise (tr and ed), *La Chirurgie du maître Henri de Mondeville* (Félix Alcan 1893) as cited in Jones (n 382), 116. Mondeville also advises the physician to 'sympathise with his patients in their distress and fall in with their lawful requests so far as they do not interfere with the treatment'; as cited in John Ardene's (D'Arcy Power, ed) *Treatises of Fistula in Ano, Hemorrhoids, and Clysters*, (OUP 1910) at xx.

<sup>390</sup> Faden & Beauchamp (n 81), 63.

spirits by ‘music of violas and ten-stringed psaltery, or by forged letters describing the death of his enemies, or if he is a churchman, by telling him that he has been elected to a bishopric.’<sup>391</sup> While these overt recommendations for dishonesty within the doctor-patient relationship suggest an element of paternalism (i.e. doctor knows best) was present during the medieval period, de Ros notes that outright deception on the part of the physician would not have been regarded favourably in the Middle Ages. ‘[T]he physician who deceived was seen as doing the patient harm,’ he writes, ‘and was therefore behaving in a morally incorrect way.’<sup>392</sup> Some commentators have suggested that this call for deception among physicians represents a medieval consideration of the patient’s role in decision-making practices. Pernick, for instance, maintains that Mondeville’s instructions not to accept a case where the patient violently opposed the treatment amount to a prohibition against treating patients without their consent<sup>393</sup> – a contention that both Katz and Faden and Beauchamp dispute, maintaining that the medieval view was that uncooperative patients did not make for successful cases.<sup>394</sup> Instead, deception was counselled only as a means of facilitating a patient’s acquiescence. The divine authority thought to have been bestowed upon the physician must have influenced patients’ own perceptions of obedience and acquiescence to doctors’ knowledge. Is a concept of consent within medieval doctor-patient relationships completely elided here?

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<sup>391</sup> Mondeville in Nicaise (n 389), 109.

<sup>392</sup> G.O. de Ros, ‘The Ethical Manipulation of the Patient in the Ancients versus Moderns Controversy: The Impact of Giuseppe Gazola’s *Il Mondo Ingannato da Falsi Medici (1716) in Spain*’ in Kottek and Ballester (n 329), 216. de Ros also comments on how the eighteenth century’s use of the term ‘deception’ held more positive connotations (e.g. as synonymous with ‘error’ or ‘amenable to correction’) than the negative understanding of the word that is ‘characteristic of Baroque literature,’ 216.

<sup>393</sup> Pernick (n 316).

<sup>394</sup> This disagreement rests largely on differing interpretations of the medieval physician’s interest in obtaining the patient’s ‘confidence’ – a term specifically used by Mondeville and found in other ethical treatises of the era. See Faden and Beauchamp (n 81), 63-64.

Consent was discussed explicitly by many medieval theologians with respect to a number of areas of medieval life. For the most part, it was a concept treated much the same as it is today, i.e. presumed to be present but for evidence of its negation, usually in the form of fraud, duress, or coercion. This creates the familiar difficulty of determining what medieval consent *was* rather than simply what it was *not*. Further, there is a tendency among contemporary scholars to rule out the presence of a medieval consent within the doctor-patient relationship on the basis that very little evidence of consent serving as an expression of autonomy can be found in the Middle Ages.<sup>395</sup> Consent was, however, given significant and explicit commentary in at least three areas of medieval life, namely: marriage formation, religious conversion, and trade and commerce.

#### *Coupling, Conversion, and Commerce*

Perhaps not surprisingly, given the religious backdrop of the medieval doctor-patient relationship, consent was largely regarded as a matter of sacramental concern rather than legal interest.<sup>396</sup> This juxtaposition reveals a disjuncture between the legal approach to consent, which was concerned with external factors (e.g. words spoken, acts performed), and the theological, which dealt with the state of a person's internal will. For Aquinas, the difficulty in such cases arose from the view that no one but the would-be-consenter and God might know the truth of these external signs of consent.<sup>397</sup> In religious conversion cases, for example, the act of baptism often served as the signification of the converter's consent and, as Farber notes, while

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<sup>395</sup> As suggested by Katz: '[f]rom the decline of the Greek city states to the 18<sup>th</sup> century, no major primary or secondary documents on medical ethics... reveal even a remote awareness of a need to discuss anything with patients that relates to their participation in decision making,' (n 383), 7.

<sup>396</sup> Farber (n 321).

<sup>397</sup> This is the same concern John Locke raised in his own musings on consent, as explored in Chapter One.

consent thus presented a theoretical difficulty in recognizing conversion, it did not constitute a significant practical problem. People who watched the convert's baptism had no way of knowing whether she had truly consented to the baptism, but at the same time they did not really need to know... [O]thers could treat her as though she were baptized, and if she were not it would be her sin, not theirs.<sup>398</sup>

The situation was made more complicated, however, with the involvement of a third party such as in marriage formation cases or the doctor-patient relationship. In such instances, the 'truth' of one's consent had a more practical consequence, whether that was in terms of establishing a valid marriage or, in the case of medicine, obtaining good health. Of particular concern in these circumstances was the presence of factors that might render one's consent inauthentic, such as the presence of fraud, fear, or pain. Determining how much coercion or duress was needed to negate one's consent was a complicated matter and medievalists tended to rely on Roman law for these determinations. This was a high standard, requiring extraordinary levels of force to vitiate consent, leading some medieval lawyers to suggest that even 'forced will is will.'<sup>399</sup> This represents a distinction the Romans saw between force and compulsion, the former involving no will at all but rather a physical over-powering that results in an undesirable action and the latter understood to be 'a declaration of will which is elicited under pressure.'<sup>400</sup> This understanding of a forced will (or 'coerced consent' as was examined in Chapter Two) stems from Aristotle's observations on responsibility in the seventh book of his treatise, *Nicomachean Ethics* in which Aristotle considers a moral paradox in Socrates' assertion that 'no person acts against her better judgment.'<sup>401</sup>

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<sup>398</sup> Farber (n 321), 95.

<sup>399</sup> Farber (n 321), 95.

<sup>400</sup> H.A. Holstein, 'Vices of Consent in the Law of Contract' (1938) 13 *Tulane Law Review* 560, 569.

<sup>401</sup> Here, I am paraphrasing Aristotle in my use of the female pronoun. W.D. Ross (tr and ed), *The Works of Aristotle* (Clarendon 1908) provides the following translation of the original text:

For Socrates was entirely opposed to the view in question, holding that there is no such thing as incontinence; no one, he said, when he judges acts against what he judges best-people act so only by reason of ignorance (Book VII, s. 2).



Aristotle, disagreeing with Socrates, suggests that there are many circumstances where one might act against one's preference, the most prominent of these being dire need. Aristotle offers the example of a captain forced to throw cargo overboard during a severe storm to save the ship and its crew. This exercise of will was considered by Aristotle to be of a 'mixed' character: involuntary in that external factors had forced the captain into making an undesired choice and yet still voluntary in that they are 'worthy of choice' (and, in fact, resulted in one being made). Thus emerges the Roman notion that even a forced choice is a choice. The challenge, of course, was in determining how much force, duress, or fear might be sufficient to negate the will behind the choice.

The difficulties in assessing these 'coercive' factors were made all the more serious when consent's role in securing a patient's healing was considered. Just as in the case of a sacramental bond, a cure for what ailed the patient was only attainable if a true divine union had been achieved. Such was the contemplation Thomas Aquinas pursued when he responded to Aristotle's *Nicomachean Ethics* in an attempt to determine whether acts of mixed or forced will might still be considered sinful. For most canonists, the mixed nature of a will was not relevant in determining an act's sinfulness. 'People never acted according to pure will, they believed, because people are by definition fallen and tied to their bodies.'<sup>402</sup> Thus, a diminished will did not diminish one's responsibility. Instead, such instances were merely signs of one's will having been influenced by one's passions or appetites, rather than negated entirely. As Diana Wood has suggested of the medieval period:

Living a righteous life involved the voluntary limitation of appetites and desires and the avoidance of extremes. The Christian had to live in the world and survive, but this involved a permanent balancing act between the often

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<sup>402</sup> Farber (n 321), 95.

incompatible needs of body and soul – physical comfort in this world against eternal salvation in the next, material claims against spiritual ones.<sup>403</sup>

Control of the appetite and its related passions was thus not simply prescribed in the Hippocratic Oath with respect to the role of the physician, but it was also an integral component to a patient's ability to 'truly' consent. This was depicted in medieval medical manuscripts, where the margins were often marked with bestiary images, displaying animals playing the roles of humans who had given in to their passions, always to fatal consequence.<sup>404</sup> Similarly, the fabled caladrius would not return the glance of a patient who had not adequately managed these appetites in alignment with God – an imbalance that was often understood through the lens of Galen's humours.

The physician was thus positioned as both a monitor of this human susceptibility to passion in others and as a model of restraint in himself.<sup>405</sup> For Thomas Aquinas, the words spoken or acts performed by the parties involved were secondary considerations to whether a true union had been created. What mattered was the truth of the parties' internal will – and this couldn't be known, or at least not by any earthly figure.<sup>406</sup>

This provides some insight into not simply how consent figured in medieval thought but also how knowledge itself was ordered and understood in the Middle Ages. Bakos has

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<sup>403</sup> D. Wood, *The Origin of Capitalism: A Longer View* (Verso 2002), 16.

<sup>404</sup> Jones (n 327).

<sup>405</sup> I employ the male pronoun here given the prevalence of male physicians during the medieval period despite evidence of female physicians as early as Antiquity. See MacKinney (n 335) who observes that 'a great deal of practical medicine [was] performed by midwives and nurses, but France never had a tradition of feminine physicians comparable to that of Trotula and the other women of Salerno,' (72). Medical training for women, however, is thought to have declined during the height of the Middle Ages as 'witch hunts' became more common. As Rhoda Wynn remarks: 'In England and France, the passage of licensure laws and the formation of guilds in the 13th century further prohibited women from the practice of medicine. Even midwifery, previously a woman's field, was dominated by men by the 17th century'; R. Wynn, 'Saints and Sinners: Women and the Practice of Medicine throughout the Ages' (2000) 283(5) *Journal of the American Medical Assn* 668, 668.

<sup>406</sup> Aquinas contends, 'the expression of words without inward consent makes no marriage,' *Summa Theologica*, Vol. 5, Part III, Second Section and Supplement: "The Marriage Consent," Suppl. Q. 45, Art. 4 (Cosimo Press 2007) 2715.

described the medieval period as a ‘finalistic-teleological Aristotlean-Christian universe,’<sup>407</sup> a world where things are what they are for, and where all these ends relate, ultimately, to God. Within this frame, people understood the human soul to have two components: the *intellectus*, whereby a person came to think and understand the world around her; and the *voluntas*, that which governs human desire and willing. Much of the theology of the medieval period aimed to determine which of these two faculties was superior and while contemporary readers might view such debates as overly esoteric, Bakos insists that they were of tremendous practical value during the medieval period given their influence on how one might choose to live one’s life.<sup>408</sup> In keeping with the era’s teleological quality, these two components to the human soul were understood only in relation to their end. Thus, any knowledge – including science or medicine – must necessarily find its purpose in the divine. For medievalists, ‘the essence of human knowing and willing consists of becoming (more and more) a likeness of God.’<sup>409</sup> To seek knowledge merely for its own sake was thought of as a sinful activity in medieval times, understood as a form of vanity or *vana curiositas mundi*, a ‘vain curiosity of the world’ given its eschewal of the divine.<sup>410</sup> Similarly, to leave the intellect unengaged, to avoid knowing God was to commit the opposite moral sin of pride (or *superbia*), assuming one knew all there was to know – an acquaintance with the world reserved only for God. The desired middle ground between these two points was *sapientia*, a

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<sup>407</sup> G.T. Bakos, *On Faith, Rationality, and the Other in the Late Middle Ages: A Study of Nicolas of Cusa’s Manuductive Approach to Islam* (Pickwick Publications 2011), 7. Bakos attributes this description to his mentor, Jos Decorte, most specifically his 2001 title, *Raak Me Niet Aan* (Pelckmans 2001), 15-20. Paul Vincent Spade offers a similar, if perhaps more humorous, description of the period in his entry for ‘medieval philosophy’ in the Stanford Encyclopedia of Philosophy: ‘Here is a recipe for producing medieval philosophy: Combine classical pagan philosophy, mainly Greek but also in its Roman versions, with the new Christian religion. Season with a variety of flavorings from the Jewish and Islamic intellectual heritages. Stir and simmer for 1300 years or more, until done’; in Zalta (ed), (n 101).

<sup>408</sup> For example, Franciscans were known to hold the will in greater esteem than the intellect, while Dominicans espoused the opposite position (n 407).

<sup>409</sup> Bakos (n 407), 7.

<sup>410</sup> Bakos (n 407), 11.

‘wisdom’ understood in the medieval period as a competence in practical knowledge, i.e. knowing how to live a good or ‘godly’ life.

This picture of the medieval world as framed within a religious epistemology results in a convergence of knowledge and belief such that there could be ‘no sound rationality without sound faith.’<sup>411</sup> Thus medicine, like any scientific inquiry, was rooted in a quest for divine likeness; to seek truth or further awareness of the world was to seek God. Only His knowledge was true knowledge. As Bakos notes:

According to the Bible, Christ himself said: ‘I am the way, the truth, and the life.’ In this biblical dictum, the practice (the way), the epistemological (the truth), and the existential (the life) dimensions of (medieval) knowledge meet.<sup>412</sup>

The difficulty this posed to medievalists, however, lay in the unseen nature of God. Despite the belief of having been created in God’s image, human knowledge of the divine was limited by corporeality and its ‘blinding’ effect.<sup>413</sup> Yet some avenues to divinity remained. Augustine was one of many medieval theologians who espoused the view that divine truth had been revealed to humans in two forms, the Book of Nature (which was unreadable after the Fall) and the Revealed Book, or book(s) of the Bible.<sup>414</sup> This understanding led to a prominent belief in the Middle Ages that the world was replete with symbols of God. Given that human failings prevented an unmediated view of the divine, the search for truth entailed a constant attempt to see the unseen, to interpret the symbols of God which lay hidden in their mundane, earthly forms.<sup>415</sup>

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<sup>411</sup> Bakos (n 407), 16.

<sup>412</sup> Bakos (n 407), 17.

<sup>413</sup> Augustine is often attributed with employing this metaphor of ‘seeing’ or ‘vision’ in his explorations of medieval mysticism; see: E. Serene, ‘Demonstrative Science’ in N. Kretzmann, et. al. (eds) *The Cambridge History of Late Medieval Philosophy* (CUP 1988).

<sup>414</sup> J.R. Weinberg, *A Short History of Medieval Philosophy* (Princeton Univ. Press 1964); and Bakos (n 407).

<sup>415</sup> Nicolas de Cusa coined this human attempt to understand or know the divine as ‘learned ignorance,’ see: F. E. Cranz, ‘Nicolaus de Cusa and Dionysius Areopagita’ in T.M. Izbicki and C.M. Bellito, (eds) *Nicholas of Cusa and His Age: Intellect and Spirituality* (Ashgate 1952).

Aquinas understood this exercise of mysticism as *cognito dei experimentalis*, or ‘knowledge of god through experience.’<sup>416</sup> This amounted to a search for signs in almost all aspects of medieval life, where everything visible might represent the invisible.<sup>417</sup>

This same task was applicable to the human quest for unity with God. Seeking God and aligning one’s life with His was the teleological end of all activity in the Middle Ages, including scientific (or medical) pursuits. And while such human acts and ways of knowing were necessarily imperfect, striving for this skewed view of the divine, for a recognition of God in all that was not God was imperative for a good (and healthy) life. This may explain the prominence of beliefs in magic during the medieval period, particularly in terms of medicinal remedies or treatments that were thought to bring good health.<sup>418</sup> In a world replete with hidden signs of the divine, such a belief would be entirely rational. As Kieckhefer remarks

The people in medieval Europe who used the term ‘magic’ thought of it as neither irrational nor nonrational but as essentially rational... [Those] who used, feared, promoted, or condemned magic, and who identified magic as such, not only assumed it worked but could give (or assumed that authorities could give for them) reasonably specific explanations of how it worked.<sup>419</sup>

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<sup>416</sup> J. Salomensen, *Enchanted Feminism: Ritual, Gender, and Divinity among the Reclaiming Witches of San Francisco* (Routledge 2002), 132.

<sup>417</sup> As de Cusa (1460) put it in his work, *De Possest*: ‘What is the world but the visible appearance of the invisible

God, and what is God but the invisibility of things visible?’; as cited in Cranz, (n 415), 312. Bakos suggests this amounts to a symbolic structure for medieval life and the limitations of human knowing. He writes: ‘[A]s medieval knowledge is aimed at a vision of God, i.e. seeing the invisible / the absent / the transcendent within the visible/ the present / the immanent... all medieval knowledge shares a basic symbolic structure: for S (the subject) an X stands for Y. Something present (X) designates / indicates / signals something absent (Y),’ (n 407), 9.

<sup>418</sup> Richard Kieckhefer notes that the writings of both Augustine and Isidore de Seville contain lengthy discussions of magic: R. Kieckhefer, ‘The Specific Rationality of Medieval Magic’ (1994) 99(3) *The American Historical Review* 813, 815. The works of both of these writers also contributed to the understanding of medicine as a ‘divine art,’ see *infra* text n. 381.

<sup>419</sup> Kieckhefer (n 418), 814.

Many of these ‘magical’ practices and rituals were, however, often in conflict with the medical teachings of the Church, and so Christianity held that God Himself had provided a model for seeking the ‘unseen.’ As noted in John 4:12, ‘No man hath seen God at any time. If we love one another, God dwelleth in us, and his love is perfected in us.’ Bakos elaborates on this notion:

God’s activity and happiness consists of the fact that He knows and loves Himself (within the Trinity); and that He knows and loves Another than Himself (in the Creation). Since man’s task is that of becoming similar to God, man has to arrive at knowledge of and love for God in something other than God... Through understanding and loving this Other, humans can understand and love God Himself (in this Other).<sup>420</sup>

This openness to the other is understood in Christian theology as *agapeic* service, i.e. an engagement with the other in a state of unselfish love, akin to the love God is understood to have for Himself and humans. *Agape* is often articulated as a groundless or ‘unmotivated’ love, offered to another without judgment or prerequisites. ‘It does not look for anything in man that could be adduced as motivation for it.’<sup>421</sup> Yet, because *agape* is a divine love, human efforts will necessarily be only approximations of it, thus leading to a dominant understanding in Christian theology of faith as the ‘human response to God. Through faith, the believer may participate in *agape* toward the neighbour.’<sup>422</sup> And in so doing, the groundwork is laid for achieving a communion with God.<sup>423</sup> This communion with the divine is the goal of *sapientia* – a medievalist’s guide to practical living which avoids the sins of excess and, as we have seen, the risks of

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<sup>420</sup> Bakos (n 407), 8.

<sup>421</sup> A. Nygren, ‘*Agape and Eros*’ in T. J. Oord (ed), *The Altruism Reader* (Templeton Foundation Press 2007), 68.

<sup>422</sup> C. Grant, ‘For Love of God: *Agape*’ (1996) 24(1) *Journal of Religious Ethics* 3, 6.

<sup>423</sup> P.K. Moser, ‘*Agapeic Theism: Personifying Evidence and Moral Struggle*’ (2010) 2 *European Journal for Philosophy of Religion* 1.

disease. Bakos suggests that ‘in Christianity, agapeic service shown to the Other counts as the noblest and most precious – indeed Divine – activity.’<sup>424</sup>

This suggests that for the medieval subject, unity with the divine was the governing mandate, whether that was achieved through spiritual service to the Other or through ‘magic.’ This can be seen in a wide array of contexts in the Middle Ages, including a number of forums where ‘magic’ might seem a bit incongruous for the modern reader, including both medicine and the field of trade and commerce. In both of these contexts, however, the imperative to align oneself with God is the underlying function of ‘consent.’ In particular, the medieval marketplace is worth examining given how well it demonstrates that consent was not a concept associated with individualism, but rather with community – understood in terms of the relationships medievalists sought with their neighbours, but also in terms of the act of ‘communing’ with God. Medieval economic thought, Wood observes, was largely a theological enterprise.<sup>425</sup> Labours of the soul were exalted, whereas struggles towards economic betterment were not. Money-making of any kind was generally frowned upon by the Church, and in some forms, explicitly prohibited (as the canonical ban on usury in 1311 exemplifies).<sup>426</sup> Yet increased populations in towns and the early forms of industrialisation saw a shift in medieval perceptions towards economic life in the years leading up to the fourteenth century. These developments created tension between the spiritual aims of medieval life and its material circumstances perhaps best witnessed in the struggles scholars, merchants, traders, and buyers encountered when attempting to determine acceptable

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<sup>424</sup> Bakos (n. 407), 13.

<sup>425</sup> Wood (n 403).

<sup>426</sup> Visser and McIntosh note a much longer history to this 14<sup>th</sup> century ban, citing the Roman Catholic Church’s 4<sup>th</sup> century ADE prohibition of usury for clergy, extended to the laity in 5<sup>th</sup> century, and made a general criminal offence under Charlemagne in the 8<sup>th</sup> century, see: W. Vissar and A. McIntosh, ‘A Short Review of the Historical Critique of Usury’ (1998) 8(2) *Accounting, Business, and Financial History* 175.

pricing schemes for goods and services.<sup>427</sup> As noted earlier, medical practice was far from exempt from these market schemes, as fee regulations, liability provisions, and service contracts (or ‘consent forms’) rose in response to the general suspicion of physicians and the ‘just price’ of their craft. Determinations of this just price were determined by both scholars, who tended to employ natural law for its invocations of the divine, and lawyers, who relied on the jurisprudential traditions of the Romans.<sup>428</sup> This resulted in a wide range of approaches to price determination.<sup>429</sup>

Wood notes that price negotiations at any level would often involve an overlap of these three models, yet, I would argue *sapientia* is best evidenced in how medievalists reached understandings of the ‘just price.’ Aristotle’s *Nichomachean Ethics* was a key text in these determinations given its approach to justice as a virtue and the imperative it brought to subjects to act rightly – even where matters of economic advancement were concerned. Virtue, for Aristotle, was a state of mind or disposition (*hexis*) which brought about particular feelings and subsequent actions and relations with others.<sup>430</sup> Further, Aristotle defined virtue as a mean, a condition founded between the vices of excess and deficiency. For Aristotle, how this mean might be reached was necessarily contextual. Some circumstances might call for a ‘balance’ of vices which favoured more anger than another or less reason. He writes:

By virtue I mean virtue of character; for this is about feelings and actions, and these admit of excess, deficiency, and an intermediate condition. We can be afraid, for instance, or be confident, or have appetites, or get angry, or feel pity, and in general have pleasure or pain, both too much and too little, and in both

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<sup>427</sup> E.P. Thompson has documented some of these moments of tension in his work on the food riots of eighteenth century England. This work and the insights it offers on shifting notions of the ‘common good’ (and their relationship to understandings of consent) are explored in depth in Chapter Five.

<sup>428</sup> Wood (n 403).

<sup>429</sup> Although three of these emerge from the literature as dominant: (i) the natural price (fixed at the current market value); (ii) the legal price (fixed by the relative public authority); and (iii) the just price (fixed through free negotiation among individuals and thus subject to many factors, including social status).

<sup>430</sup> R. Kraut, ‘Aristotle’s Ethics’ in Zalta (ed), (n 101).



ways not well. But having these feelings at the right times, about the right things, toward the right people, for the right end, and in the right way, is the intermediate and best condition, and this is proper to virtue.<sup>431</sup>

Aristotle's critique of the invalid or unequal trade rested on a distinction between the *use* of money and money itself, emphasising that virtue was found or lost in the choices made for using money and how well these choices approximated the mean.<sup>432</sup> 'The fact, then, that we might be forced by circumstance into a trade we would not make otherwise is a condition of having bodily needs and being subject to circumstances in general, rather than a sign of an invalid contract.'<sup>433</sup> The valid exchange is thus one where each party to the trade feels as though the value for the goods or services traded has been reciprocated. Was the exchange virtuous? Did it avoid extremes? For Aquinas, these circumstantial factors result in negotiations which themselves need to be guided by a principle of 'proportionate reciprocity' in order to achieve an equality of things exchanged – a prerequisite in his mind for communities to be able to live together.

Contemporary scholars will often position consent as the marker of this equality in medieval (and modern) trade arrangements, a signifier of two minds meeting in agreement. Yet similar to the feeble role words play in ensuring the formation of marriage or one's religious conversion, medieval consent cannot be tangibly known or made present in language, thus determining its truthfulness in trade circumstances presents the same difficulties as it might in the doctor-patient relationship. What mattered more within the medieval era was that parties to a trade or to a contract for

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<sup>431</sup> Aristotle, *Nicomachean Ethics* (T. Irwin tr, Hackett 1999), Book II, Chapter 6 §2, 1106b at 15 § 10 and 11.

<sup>432</sup> This approach also reflects the Greek understanding of *hubris* and the ability of motivations (or uses of money, in this instance) to alter the (moral) nature of acts.

<sup>433</sup> Farber (n 321), 95-96.

medical service had reached some form of ‘communion’ with one another – not simply for the purposes of being able to, as Aquinas notes, ‘live together,’ but also for the aim of living in the likeness of God (and enjoying the good health this would entail).

This interest in the communion with the divine can also be seen in its practical form in the development of the practice of conciliarism among medieval canonists. Nicolas de Cusa, a fifteenth century cardinal of the Catholic Church, composed an influential text on conciliar theology in an attempt to reconcile rising conflicts between the pope and competing Church councils. De Cusa argued that the practice of reaching concord or consensus within a council mirrored Christ’s own marriage with the Church, in the way that an initial desire for unity was actualised in the parties’ agapeic service to one another. Thus, the council’s principle of acting only with the consent of all parties ‘was not merely procedural, but was rooted in a shared way of life,’<sup>434</sup> not dissimilar from Aquinas’ own concern with consent within trade and commerce as the only means by which a community might live together. Bakos, writing on de Cusa’s text, *De Concordantia Catholica* (1433), suggests:

Consent here has at least two meanings. First, it is an initial concord in the Catholic faith, and secondly, it refers also to the willingness to consent during the actual discussion. It is thus faith in the form of existential commitment that makes the actual consensus possible.<sup>435</sup>

How does this understanding of consent as an existential act of faith inform the medieval doctor- patient relationship? Moreover, what does this canonical story of consent help us understand about the conditions of possibility of the contemporary consent-as-autonomy story? The following section probes these inquiries in further detail.

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<sup>434</sup> Bakos (n 407), 20, writing on Cusa’s conciliar theology.

<sup>435</sup> Bakos (n 407), 20.

### Revisiting the Medieval Doctor-Patient Relationship: Consent as an act of Faith

The preceding discussion has suggested that acts of faith, in the medieval period, were both rational and highly pragmatic, particularly where one's health was concerned. This is a difficult pill to swallow in the twenty-first century, given dominant views of the incongruity of faith and rationality. Yet within the medieval period's faith-based epistemological frame, faith *is* rationality; it is a 'condition of possibility' for reason itself. Believing is the only way to know (ledge of the Divine) and the practical maintenance of a good and healthy life. Coupled with the medieval understanding of the physician as an agent of God and a view of disease as a form of divine intervention visited upon those who have failed to adequately align themselves with Christ, consent within the context of medieval medical practice begins to take shape.

At first glance, one might be tempted to view medieval consent as the rather familiar notion of choice. Yet, the specific faith-based epistemology of the medieval era also allows for a reading of consent through the lens of agapeic service to the other. As noted earlier, the view of practicing physicians as 'outsiders' was prevalent during the Middle Ages. This suggests that some patients may have considered obedience to their physician's orders as a form of agapeic service. Doctors were, after all, considered to be agents of the divine. Further, while faith is understood within the medieval context as a rational act, it is also an act of obedience, thus the 'choice' medieval medical consent represented was an agreement to align oneself with Christ. This was done in the most immediate of circumstances in the hope of attaining good health or ridding oneself of disease, thus prompting physicians' demands for obedience (and their prescriptions for deception to attain it). As Al-Ruhāwī instructs physicians: 'It is essential that the

physician not follow the will of the patient unless it benefits him in his improvement; he should not fear him in this nor any desire in this of his individual rights. On the contrary, it is only God that he fears and entreats.<sup>436</sup> Thus, while some patients' obedience might have been in pursuit of good health, this was understood to be a joint endeavour between the patient and physician, where only through communion with one another might unity with the divine (and its ensuing good health) be achieved. The patient's body could be known to the physician. It existed in the realm of the seen. So, too, would the patient's words or stated intentions. The truth of these words, however, was not a matter for human assessment. True knowledge and the healing it might offer were available only in the unseen, the transcendental. Together, in concord, the physician and the patient seek the divine in what is not visible. Through this consent, both might find the divine and live in alignment with God. Healing was the sign of this success; the external indicator of the unknowable inner commitment of the patient.

The emphasis on prognosis (over diagnosis) within medieval medical practice provides some support for this view. In the first instance, this might be attributed to the Classical Greek practice of making diagnosis subservient to prognosis.<sup>437</sup> While some components to this tradition involved beliefs and practices characterised as 'pagan' by medieval (monastic) scholars (such as the consideration of the planets or the signs of the zodiac in assessing a patient's ailments), the Greeks' ontological reasons for elevating prognosis over diagnosis were fairly compatible with Christian theology. As Pagel notes, for the early Greeks '[t]here is no such thing as disease; there are individuals who fall ill.'<sup>438</sup> Thus, the consideration of an individual's constitution, temperament, or

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<sup>436</sup> Levey, (n 377), 11; citing Al-Ruhawi (60a).

<sup>437</sup> Jones (n 327); W. Pagel, 'Prognosis and Diagnosis: A Comparison of Ancient and Modern Medicine' (1939) 2(4) *Journal of the Warburg Institute* 382.

<sup>438</sup> Pagel (n 437), 387.

behaviour were important for gaining knowledge of the subject and her nature rather than the (dis)functioning of her organs. Within the medieval context, this would have required access to knowledge only God might now, thus positioning prognosis as a form of ‘divine revelation.’ Wallis notes that no medieval (Latin) word existed for ‘diagnose,’ rather the term *cognoscere* is often found in its place, meaning ‘I know’ or ‘I am acquainted with.’ She argues ‘[t]he word *diagnosis* has no technical connotation for Galen, for example; it simply means knowledge, decision or judgement about *present* matters.’<sup>439</sup> These would have been visible matters, thus the medieval medical manuscript’s emphasis on urine analysis, pulse, and other visual signs of illness. The physician is instructed that the patient’s case may be ‘easily judged’ on these visual symptoms.<sup>440</sup> This judgment is limited by the doctor’s own knowledge, resulting in an emphasis on therapeutic treatments; however, a prognosis on the patient’s fate – this was a matter of divine revelation. Following this argument, Wallis likens diagnostic techniques in the Middle Ages to an ‘ordeal,’ positioned, by her, as a ‘means of finding the truth about things which are hidden.’<sup>441</sup> She employs the example of a crime without a witness. The accused is tested; in the typical medieval ordeal this is the application of a hot iron. If the accused’s arm is healed in three days, she is innocent. God thus serves as the witness – he sees what is unseeable.<sup>442</sup> Prognosis gains its status as prophecy.

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<sup>439</sup> Wallis (n 340), 276.

<sup>440</sup> This is Wallis’ preferred translation of a phrase found in a medical manuscript (circa 900 A.D.) entitled, ‘How you should visit the patient.’ She also offers the possibilities of ‘attendant circumstances’ or ‘you will easily understand the patient’s condition,’ (n 340), 276.

<sup>441</sup> Wallis (n 340), 276.

<sup>442</sup> Wallis also describes the story of the *Ivory Casket*, an account of a text Hippocrates was said to have buried with him that would reveal the secrets of life and death. Wallis notes two important things about this ‘story.’ The first is how it serves to mystify prognosis as ‘esoteric’ (or what I would argue is ‘divine’) knowledge. The second points to the title of Hippocrates’ hidden text, i.e. *Indicia valetudinum* (or ‘Indications of Illness’), noting the legal meaning of ‘indicia’ as ‘grounds of accusation.’ I would suggest Wallis’ latter point is interesting for both its depiction of God’s knowledge as hidden to humans after the Fall and for how it depicts illness as indicative or accusatory of a misalignment with Christ; (n 340), 276-277.

Within the medieval context, then, consent was a sign of virtue. It was not a simple matter of choice or a stated agreement to share one's inner will with God, but rather it was an act of aligning it with Him, through a balanced and moderate 'application of the movement of appetite to something that is to be done.'<sup>443</sup> Medieval consent is thus not a form of autonomy, but rather an existential commitment; a submission to the divine in both will and conduct, measured externally by one's balance of the passions and alignment with Christian ideals. If one did not truly make this commitment, if one lacked the requisite faith, consent (and its promised virtues) was not possible. This is not unlike the role consent was seen to play among the Ancients where consent marked the boundaries of social and juridical recognition – a sense of belonging that was itself subject to a strict regimen of prescribed behaviours and identities. The canonical story of consent found in the medieval medical context reveals this onto-epistemological role of consent even more starkly, where certain ways of being served as prerequisites for ways of knowing.<sup>444</sup> Consent is thus an existential commitment to this schema. It is an act of submission to the terms (of another) that make the very act of submission intelligible.

The suggestion that consent is more an act of submission than autonomy is one that a number of legal and political scholars have made – many of whom were canvassed in Chapter One. Yet despite an explicit acknowledgement within many of these critiques that consent serves as a form of subordination to terms set by another (and often in opposition to the interests of the consenting), the vision of consent as a signifier or

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<sup>443</sup> Aquinas, *Summa Theologica* I-II, 15 § 2, as cited in J. A. Barad, 'Aquinas on faith and the consent/assent distinction' (1986) 24(3) *Journal of the History of Philosophy* 311, 319.

<sup>444</sup> Although medievalists would likely be quick to correct my use of the plural here, suggesting there was only one way of knowing – God's.

enactment of personal freedom is left intact. Further, the role the narrative of consent-as-autonomy plays in facilitating this submission is obscured. It is only by visiting contexts where contemporary understandings of autonomy simply don't 'work' that this story is disrupted, revealing consent to be less a marker of personal freedom and more a signifier of compliance with dominant norms of intelligibility. In the Antiquity context examined in the previous chapter, this submission was to the state, establishing the boundaries of juridical and socio-cultural recognition. What the canonical story of consent revealed in this chapter's survey of medieval medicine provides is a view to the way in which consent, understood as a form of submission to the divine, operated to regulate the soul. Is this merely a medieval tale of consent, long since forgotten as the Dark Ages came to a close? Or do some remnants of this onto-epistemological power of consent continue to operate today? Is there still a way in which the 'magic' of consent to transform human error is dependent on an internal alignment with dominant ideals of 'good citizenship' or 'good morality'? How might consent continue to operate today as a site of personal salvation – or damnation – and what form might these prescriptions of subjectivity take? What existential commitment does consent-as-autonomy ask us to make?

### Conclusion

In a context where consent serves as an existential act of faith performed in agapeic service to the other, we can begin to understand its role in maintaining epistemological control over medieval life (and its hereafter) and an ontological control over its inhabitants. This chapter reviewed the various ways the Christian Church was able to maintain a monopoly over medieval medicine, including who might learn its theories, who might be granted the authority to engage in its practice, and who might benefit

from its grace. Medieval consent, following on the heels of an Ancient belief in the benefits of moderation, was a virtue – a precursor, perhaps, of contemporary scholars’ habit of endowing consent with a moral transformative or ‘magic’ power. And while contemporary patients can hardly be said to be trying to attain divinity when they sign consent forms for surgery, they may be trying to beat death, attain immortality, understand the unknowable, view the unseen, or place their bets on magic. These are some of the remnants of the canonical story of consent, unearthed from the medieval medical world.

What happens, then, when these echoed acts of faith are named ‘free’? What operations of self-surveillance or submission are obscured when consent is configured as autonomy? Understanding medical law’s doctrine of informed consent within a context of power relations is not a new line of thought. Bioethicists and medical legal scholars have long argued that unequal power relationships between the doctor and the patient create significant doubt as to the realisability (or desirability, in some cases) of a fully autonomous patient. As Wilson notes in her examination of the United Kingdom’s use of the ‘Expert Patient policy,’ the ‘ideal patient is both compliant and self-reliant.’<sup>445</sup> While this model of self-reliance has roots in the ethic of self-care developed in the medieval period’s approach to consent, the contemporary law’s treatment of the consenting subject operationalizes this ethic within a capitalist logic. This is seen explicitly in the next chapter’s investigation of the use of consent within sport – a context chosen for the same opportunity it presents for providing a ‘skewed glance’ at the consent-as-autonomy story.

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<sup>445</sup> P.M. Wilson, ‘A Policy Analysis of the Expert Patient in the United Kingdom: Self care as an expression of pastoral power?’ (2001) 9(3) *Health & Social Care in the Community* 134, 138.



## CHAPTER FOUR – MODERN SPORT

You consent to assault when you lace up your skates. It's what hockey is all about.

- Dave 'Tiger' Williams, NHL career leader in penalty points<sup>446</sup>

The Roman people is held together by two forces: wheat doles and public shows.

- Fronto, 2.216<sup>447</sup>

### Introduction

Many commentators have noted the rising level of violence in both professional and amateur sporting activities in the last decade, with a number of incidents making headlines when injuries have been severe enough to warrant legal intervention.<sup>448</sup>

Coupled with recent medical findings which suggest that a number of premature deaths among professional athletes are attributable to irreparable brain damage incurred during in-game violence, professional sports leagues and their administrators are being pressured to take a hard look at bodily harm in sport.<sup>449</sup> Interpreting their reticence to do so within the context of multi-million dollar player contracts and an industry with a

<sup>446</sup> Williams' remark was made in 1988 in response to the Canadian case of *Ciccarelli* (n 27), when Dino Ciccarelli of the Minnesota North Stars was sentenced to one day in jail and a \$1000 fine for hitting Toronto Maple Leafs player, Luke Richardson, with his stick. As reported in 'Experts: Bertuzzi civil case unlikely' *Canadian Press* (Toronto 14 March 2004).

<sup>447</sup> C.R. Haines (tr) *Marcus Cornelius Fronto: Correspondence, Vol. II* (Loeb Classical Library, 1920), as cited in Keith Hopkins, *Death and Renewal: Sociological Studies in Roman History, vol. 2* (CUP 1983), 17.

<sup>448</sup> See, for instance, the Canadian cases of *R. v. McSorley* (n 28); and *R. v. Bertuzzi* (2004) 26 C.R. (6th) 71 as well as the UK case, *R. v. Barnes* (n 3).

<sup>449</sup> For example: John Branch, 'Derek Boogaard: A Brain Going Bad' *New York Times* (New York 5 December 2011); George Vecsey, 'College Athletes Move Concussions into the Courtroom' *New York Times* (New York 29 November 2011); M.F. Wilson 'Young Athletes at Risk: Preventing and Managing Consequences of Sports Concussions in Young Athletes and Related Legal Issues' (2010) 21(1) Marq. Sports. L.J. 241; I. Dobinson and D. Thorpe 'What's Wrong with the Commissioner? Some Lessons from Downunder' (2009) 19(1) Seton Hall J. Sports & Ent. L. 105; C. Samson 'No Time Like the Present: Why recent events should spur Congress to enact a Sports Violence Act' (2005) 37 Ariz. St. L.J. 949; J.H. Kerr 'Examining the Bertuzzi-Moore NHL Incident: Crossing the line between sanctioned and unsanctioned violence in sport' (2006) 11(4) *Aggression and Violent Behaviour* 313; B. Livings 'Legitimate Sport or Criminal Assault? What are the roles of the rules and rule-makers in determining criminal liability for violence on the sports field?' (2006) 70 J. Crim. L. 495.

multi-billion dollar price tag,<sup>450</sup> further complicates the role of consent in discerning liability. Take, for instance, the recent class action suit filed by a number of former professional ice hockey players against the National Hockey League (NHL) for ‘fraudulent concealment’ of the level of risk and seriousness of injury players should expect when participating in the game.<sup>451</sup> Players launching the class action are alleging that they did not receive full disclosure of the risks of bodily harm that the game entailed, suggesting that ‘for decades the NHL has nurtured a culture of violence’ while ‘purposefully profit[ing]’ from it.<sup>452</sup> This issue of non-disclosure is an important one, given the way in which the preconditions of consent (examined in Chapter One) operate within criminal law to authorize certain forms of harm and not others on the basis of a subject’s voluntary, informed, and rational participation. The logic is that players cannot be held to have voluntarily participated in an activity (and consented to the harm it might incur) if they have not been adequately informed about the activity’s risks. Yet, as was evidenced by some of the case law examined in Chapter One, even voluntary and well-informed decisions to engage in self-harm can be overridden if the activity in question is not deemed to be sufficiently reasonable – a requirement that has been interpreted in the criminal law context as largely concerned with notions of social utility.

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<sup>450</sup> The National Football League (NFL) alone reported revenue of just over 9.5 billion dollars in 2012. See: M. Burke, ‘How the National Football League can reach 25 billion in annual revenues’ *Forbes.com*, August 17, 2013. Online at: < <http://www.forbes.com/sites/monteburke/2013/08/17/how-the-national-football-league-can-reach-25-billion-in-annual-revenues/>>. Last accessed: December 7, 2013.

<sup>451</sup> This case is largely thought to have been spurred by the \$765 million dollar settlement a similar law suit against the National Football League (NFL) achieved merely three months prior to the commencement of the NHL suit in 2003. See: Sean Gordon, ‘Former players sue NHL, say league hid concussion risks’ *Globe & Mail* (Toronto 25 November 2013). Online at: < <http://www.theglobeandmail.com/sports/hockey/former-players-sue-nhl-say-league-hid-concussion-risks/article15599650/>>. Last accessed: December 7, 2013.

<sup>452</sup> Gordon (n 451).

This suggests there is perhaps no other place in law where rhetoric about the ‘common good’ and the cultural values and ideals of personhood it implicates is as explicit as it is in the criminal law’s consideration of consent where bodily harm occurs within the context of presumably consensual activities. In such instances, the law is tasked with assessing what forms and levels of violence are of sufficient public utility or social good as to fall within the ambit of consent. And as the criminal law’s adjudications in the field of ‘play’ have demonstrated, these determinations of social utility are often troubled, perhaps no better evidenced than the now infamous English case, *R. v. Brown*.<sup>453</sup> As noted in Chapter One, the court’s assessment of acceptable and unacceptable forms of violence in *Brown* was made in connection to an understanding of ‘harm’ that many commentators have suggested relied on hegemonic understandings of masculinity and heteronormativity – all housed within legal definitions of ‘reasonableness.’<sup>454</sup> Not unlike the previous chapters’ historical examinations of consent as a form of submission, might the same paradigm be applicable in the modern legal context? Do criminal law consent cases reveal a prescriptive demand for conformity to dominant norms of intelligible personhood and action?

This chapter pursues these inquiries within criminal law cases that address the defence of consent for assaults which occur during contact sports. Of central concern is an examination of how judicial treatments of ‘harm’ (as a delimiter of consent) serve a grander scheme of entrenching ideals of hegemonic masculinity and the use of bodily capital. The chapter begins with a review of the existing case law on the availability of consent to vitiate otherwise illegal violent activity, highlighting the courts’ consideration of ‘harm’ in its adjudication of the activities which might be carved out as

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<sup>453</sup> *Brown* (n 27).

<sup>454</sup> See, for instance, the commentary offered by Michael Thomson in his text, *Endowed: Regulating the Male Sexed Body* (Routledge 2008). See in particular, Chapter Six.

exceptions against assault liability. This harm principle is then discussed alongside an examination of hegemonic forms of masculinity which privilege (and demand) the commodification of the body as capital in exchange for civic virtue. How these ideals of sporting masculinity become embedded in cultural life is explored through an examination of how sport and play are treated judicially in cases where the defence of consent is raised to charges of assault that occur ‘on the field.’

### In Harm’s Way: The consent defence in sport

‘[T]he nature of any assault offence imports the notion of violence, and violence certainly is not something that is countenanced in the Canadian society.’

- *R. v. Bertuzzi*<sup>455</sup>

‘I went to a fight last night and a hockey game broke out.’

- common Canadian joke

The consent defence in criminal law holds a somewhat paradoxical position with respect to the relationship between the citizen and her state. Vestiges of early liberalism’s social contract abound in both legal and philosophical accounts of the liberty individuals should have from state intervention. Each person is thought to be entitled to the ‘freedom to be left alone’ and consent is thought to enshrine this principle of independence. Yet there are instances where the law acts coercively, denying individuals the (legal) capacity to consent when exercised in a way that causes harm.<sup>456</sup>

This tension between a principle of non-interference and the state’s acts of legal paternalism often comes to the fore in the contexts of sport and play given the long-standing perception of these recreational activities as forums for social ‘time outs,’ where citizens could relinquish some of the responsibilities associated with everyday

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<sup>455</sup> *Bertuzzi* (n 448).

<sup>456</sup> Joel Feinberg has suggested state coercion can be justified on both harm and offense principles; *The Moral Limits of Criminal Law, Volume 2: Offense to Others* (OUP 1985).

life.<sup>457</sup> Two claims are usually made in favour of the law's application within the spheres of sport and play. The first is some version of the 'rule of law,' or a principle of universality, where it is argued that the law extends to all persons and activities that fall within the jurisdiction of the state. This is the argument J.S. Mill makes in his text, *On Liberty*, where he maintains that these acts are well within the jurisdiction of the state as it carries out its mandate to ensure the general welfare of all citizens.<sup>458</sup> Mill is rather clear that these interventions must be done to prevent individuals from doing harm to others, yet, in the judicial treatment of consent in both North America and the United Kingdom, this restriction is applied when the perceived harm is done to others as well as oneself.<sup>459</sup> For Mill, as well as many of his contemporary adherents, the exemption of self-harm is to prevent the practice of legal paternalism in law's adjudication of an individual's free choice, a view aptly demonstrated by H.L.A. Hart (1963) in the following passage:

Choices may be made or consent given without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when the judgment is likely to be clouded; or under inner psychological compulsion; or under pressure by others of a kind too subtle to be susceptible of proof in a law court. Underlying Mill's extreme fear of paternalism there perhaps is a conception of what a normal human being is like which now seems not to correspond to the facts.<sup>460</sup>

The normative component to law's assessment of harm is made explicit in Hart's commentary and points to the second common justification for the law's intervention in sport and play: the enforcement of a common morality. Sir Patrick Devlin is an oft-

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<sup>457</sup> D. Gendall, 'The Sport of Boxing: Freedom versus Social Constraint' (1997) 5 *Waikato L.R.* 71.

<sup>458</sup> Mill, Rapaport (tr), (n 105), 73.

<sup>459</sup> Mill's classic formulation states, 'the sole end for which [hu]mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is... to prevent harm to others.' He makes the point even clearer in what Feinberg calls Mill's 'illiberal principle' (n 105), 4:

His own good, either physical or moral is not a sufficient warrant. He cannot be rightfully compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise . . . These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise.

<sup>460</sup> H.L.A. Hart. *Law, Liberty, and Morality*. (Stanford Univ. Press: Stanford, CA 1963), 32-33.

cited proponent of this view, having argued that law is meant to serve a normalizing function which, in turn, serves to police private immorality.<sup>461</sup> This ‘common morality’ is what Devlin suggests is ‘part of the bondage’ that one’s participation in a society entails.

Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought.<sup>462</sup>

Interestingly, Devlin’s argument that society is held together by the ‘invisible bonds of common thought’ is not unlike the medieval view of consent (examined in the previous chapter) as an act of existential commitment that is required before consensus might be reached. John Locke’s notion of tacit consent seems to have played a similar role, as Chapter One delineated, where one’s use of the ‘common sense’ marked one’s membership in a community and an agreement to comply with its principles of right and wrong.

This ‘moralizing’ function of the criminal law is well evidenced in much of the North American and English case law on the defence of consent to various charges of assault, where a number of ‘allowable’ forms of bodily harm have been recognized.<sup>463</sup> These

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<sup>461</sup> P. Devlin, *The Enforcement of Morals* (OUP 1965).

<sup>462</sup> Devlin (n 461), 9-10.

<sup>463</sup> For a review of the relevant offences commonly triggered by sports-related violence, see Angela Baxter, ‘Hockey Violence: The Canadian Criminal Code and Professional Hockey’ (2006) 31(2) *Man. L.J.* 281 (for Canadian offences); Christo Lassiter, ‘Lex Sportiva: Thoughts Towards a Criminal Law of Competitive Contact Sport’ (2007) 22(1) *St. John’s J. Legal Comment* 35 (for coverage of applicable American offences); and Stefan Fafinski, ‘Consent and the Rules of the Game: The interplay of civil and criminal liability for sporting injuries.’ (2005) 29 *J. Crim. L.* 414 and Jack Anderson, *The Legality of Boxing: A Punch Drunk Love?* (Birkbeck Law Press 2005), particularly Chapter Four (for relevant UK offences).

include body piercing and tattooing, parental discipline, reasonable surgery,<sup>464</sup> religious or ceremonial acts (e.g. circumcision, flagellation),<sup>465</sup> ‘horseplay’ or ‘rough housing.’<sup>466</sup> Contact sports have also been listed within this field of exception, although subject to a number of qualifiers. Where an act can be said to be ‘harmless,’ the principle of non-interference demands that it fall outside the ambit of state intervention; however, the content and scope of this requisite ‘harm’ is open to wide interpretation, often invoking cultural values and norms which privilege some forms of action while marginalising others. The ensuing discussion attempts to trace the establishment of these moral delimiters through a review of some of the relevant case law. Emphasis is placed on British and Canadian cases given the jurisprudential leadership which these countries have taken on the issue.<sup>467</sup>

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<sup>464</sup> In *Brown*, the House of Lords suggested surgeries that were deemed “necessary” would fall within the exception. This suggests that optional and presumably more normatively complicated surgeries (e.g. cosmetic, sex reassignment) might not be deemed “reasonable” within the jurisprudence. For commentary on this, see: J. Anderson, ‘No licence for thuggery: Violence, sport, and the criminal law’ (2008) 10 Crim LR 751; and P. Alldridge, ‘Consent to medical surgical treatment: The Law Commission’s recommendations’ (1996) 4 Medical LR 129.

<sup>465</sup> Some commentators have suggested that Lord Templeman’s claim that ritual circumcision fell within the lawful exceptions to violent offences was *obiter dicta*. See, for example: M. Fox and M. Thomson, ‘A covenant with the status quo? Male circumcision and the new BMA guidance for doctors’ (2004) 31(8) Journal of Med. Ethics 463. See also the New Zealand Court of Appeal case, *R v Lee* [2006] 5 LRC 716 involving a fatal ‘exorcism.’ In that case, religious practice was rejected as a ground where consent would always be operative. Rather, the same contemplation of the factors of recklessness and intention would need to be considered (as in other areas of the consent defence).

<sup>466</sup> *Brown*, (n 27). See also A. Houlihan, ‘When “No” means “Yes” and “Yes” means Harm: HIV Risk, Consent, and Sadoomasochism Case Law’ (2011) 20 Law & Sexuality 31 for some discussion of these exceptions.

<sup>467</sup> Paul Farrugia notes: “Canada was among the first to respond to [public] concerns [about sporting violence] and followed the line taken by British courts, making more than one hundred criminal convictions for offences involving player violence in the 1970-1985 period.” One could argue with Farrugia’s depiction of Canadian jurisprudence as subsequent to Britain’s given how much reliance British courts have placed on Canadian sports cases and, in some instances, adopted the governing principles of the Canadian approach to the defence of consent (e.g. *Cey*). Similarly, many suggest the high intensity of the bodily contact incurred during ice hockey games has been a precipitator of these legal interventions in North America; P. Farrugia, ‘The consent defence: sports violence, sadoomasochism, and the criminal law’ (1996) 8 Auckland U. L. Rev. 472, 477.

### *United Kingdom*

Early common law positions with respect to violence in contact sports were concerned with the subjective state of mind of the accused and whether it was sufficient to satisfy the mental element of the offence in question.<sup>468</sup> In such configurations, consent did not arise as a pertinent issue to the determination of criminal liability. Lord Hale, writing in 1778, espoused the view that any death which occurred during a contact sport would constitute manslaughter on the grounds that the accused had intended to cause harm to her opponent.<sup>469</sup> Hale was writing in opposition to another prominent contention at the time put forth by Sir Michael Foster in his 1762 publication, *Crown Cases*, which suggested the ‘mutual consent’ of the parties would vitiate the accused’s malicious intention.<sup>470</sup> The courts would later seek a compromise between these two approaches in a trilogy of late 19th century cases, namely *Bradshaw*<sup>471</sup>, *Moore*<sup>472</sup>, and *Coney*<sup>473</sup>, establishing a form of implied consent for sporting activities which would take into account the intent concerns raised by Hale while establishing grounds of exception for bodily harm incurred during activities which Foster held to be of particular social value.<sup>474</sup> Foster based these assessments of public utility on whether the activity in question was one of the many ‘manly diversions’ of the day intended to ‘give strength, skill and activity’<sup>475</sup> such as ‘friendly exertions of cudgeling, fencing and trials of

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<sup>468</sup> This has led some commentators to debate whether consent serves as a defence to charges of assault or is better positioned as a justification (i.e. a negation of the mental element). See G. Hughes, ‘Two views of consent in the criminal law’ (1963) 26 Modern LR 233.

<sup>469</sup> Hale mentions the specific contact activities of wrestling and ‘cudgens,’ a martial art performed with a singlestick that was popular in the Middle Ages and continued well into the modern period in Europe. M. Hale, *History of the Pleas of the Crown* (E. Rider 1778), 472; as cited in Note, ‘Consent in Criminal Law: Violence in Sports’ (1976) 75 Mich. L.R. 148, 170.

<sup>470</sup> M. Foster, *Crown Cases* (Clarendon 1762), 260.

<sup>471</sup> (1878) 14 Cox C.C. 83.

<sup>472</sup> (1898) 14 T.L.R. 229.

<sup>473</sup> (1882) L.R. 8 Q.B.D. 534.

<sup>474</sup> Anderson (n 464) refers to this as the ‘implied sporting consent’ principle.

<sup>475</sup> Foster, (n 470), 260.



strength involving wrestling and sparring.<sup>476</sup> This association of social value with masculine endeavours is perhaps not surprising given that the first known commentary on the issue of consent in contact sports marked out an exception for playful activities ‘done only for disport and trial of manhood.’<sup>477</sup> This view was carried forward in the case law into the late nineteenth century, as British courts considered the legality of prizefighting,<sup>478</sup> and North American courts followed suit.<sup>479</sup> This convention worked to produce certain understandings of masculinity through sport, namely physical strength, skill, risk, recreation, and – as the English cases of *Brown* (1993) and *Wilson* (1996) would later make explicit – heterosexuality.<sup>480</sup>

These cases highlight the normative quality of the criminal law’s consideration of the public interest and the ways in which standards of reasonableness are linked with ideals of masculinity. This suggests consent must be articulated in ways that reflect a recognised (and arguably, normative) way of being in the world in order to be recognisable and deemed valid, thus enabling an avoidance of criminal liability. The majority in *Brown* suggested ‘common sense’ would dictate a point where the harm incurred would cross a line of severity where after considerations of consent would be

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<sup>476</sup> Anderson (464), 40.

<sup>477</sup> M. Dalton, *The Countrey Justice*. (The Company of Stationers 1635), 246.

<sup>478</sup> Prizefighting was effectively banned in Britain following a series of cases where public fighting exhibitions were dissociated from the allowable ‘manly diversions’ on the basis of their potential (and presumed intent) to disrupt the public peace. Sir Edward East’s 1803 treatise, *Pleas of the Crown*, served as a basis for many of these judgments. Writing in response to Foster’s earlier category of exceptional activities, East writes:

But the latitude given to manly exercises of the nature above described, when conducted merely as diversions among friends, must not be extended to legalise prize fightings, public boxing matches, and the like, which are exhibited for the sake of lucre and are calculated to draw together a number of idle and disorderly people (270; as cited in Anderson (n 464), 38).

<sup>479</sup> See, for instance, the U.S. case of *State v. Burnham* (1884) in which Foster’s category of ‘manly diversions’ is employed to distinguish between legal sport (in that case, boxing) from events thought to breach the public peace (namely, fist/prize fighting); (1884) 48 Am Rep 801, as cited in Anderson (n 464), 58, n. 62. Similarly, see *R. v. Jobidon* [1991] 2 S.C.R. 714, the Supreme Court of Canada case which found consent to be inapplicable as a defence to assault charges arising from a fist fight on the grounds that it held no social value.

<sup>480</sup> For an insightful discussion of these associations, see Thomson (n 454), Ch #6. See also: Houlihan (n 466).

‘irrelevant.’<sup>481</sup> This is in keeping with the discussion in Chapter One of the role of ‘common sense’ in producing and enforcing normative ways of being and acting in the world. Certainly, the meaning that ‘common sense’ has been given jurisprudentially lends credence to this claim. As one commentator has suggested: ‘In addition to the cognitive, volitional, and formal requirements, the appropriate act of tacit consent must meet the criterion of generality... something virtually every person does.’<sup>482</sup>

A dominant interpretation of this generality principle in the criminal law’s articulations of consent is a ‘regularity of behaviour,’ i.e. an assumption about the gestures and actions which can be expected from people on the basis of conventionality.<sup>483</sup> This is particularly prominent where implied consent is at issue in criminal law, where unwritten rules of conduct or behavioural expectations inform the reasonableness of a subject’s consent. Thus, silence might be understood as a form of (implied) consent where the circumstances in which it occurs create the expectation or convention for this accepted signification.<sup>484</sup> Articulated in law as a standard of common sense,<sup>485</sup> implied consent relies on a shared understanding of gestures or circumstances from which particular significations are interpreted as acts of volition or informed choice. Certainly the development of the defence of implied consent in sporting activities has rested on these presumptions of generality. Courts have accepted the defence of consent for what

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<sup>481</sup> Giles (n 158), 108.

<sup>482</sup> E.A. Harris, ‘From Social Contract to Hypothetical Agreement: Consent and the Obligation to Obey the Law’ (1992) 92 Colum. L. Rev. 651, 660.

<sup>483</sup> J.A. Simmons, ‘Political Obligation and Consent’ in Miller and Wertheimer (n 108), 316.

<sup>484</sup> Emily Jackson offers the example of an outstretched arm offered to a nurse holding a needle; Jackson, (n 114), 219. This same circumstance was the subject of the 1891 case, *O’Brien v. Cunard Steamship Co.* where the charge of battery (for injuries sustained following a vaccination on a passenger ship) was unsuccessful following the court’s determination that the passenger’s outstretched arm constituted a valid form of (implied) consent (154 Mass. 272, 28 N.E. 266)

<sup>485</sup> As F.G. Miller has put it: ‘valid consent in ordinary life is often implicit or tacit. We presume that competent adults will know what they are consenting to when they offer a token of unforced consent, absent deception, based on either common-sense understanding of how the world works or an expectation that it is up to them to undertake inquiry about whether what they consent to is in their interest’; Miller, F.G. ‘Consent to Clinical Research’ in Miller and Wertheimer (n 108), 380.

would otherwise be considered criminal conduct provided some rendering of ‘regularity as rationality’ or reasonableness is made out. British case law has relied on a series of Canadian cases addressing injuries sustained during both professional and amateur ice hockey games when determining the nature of this ‘regularity.’<sup>486</sup> That case law is reviewed below.

### *Canada*

The brief review of British cases provided above has demonstrated how the courts have employed consent to vitiate the wrongdoing of bodily harm provided the injuries took place during one of the ‘exceptional’ activities courts have recognized in the past. Sport has long fallen within these exempted grounds; however, even this exception has been subject to legal limiters. One of these, as discussed above, has been the subjective (and problematic) construal of the ‘public good.’ Aside from the moralising effect of these determinations of social utility, the consent defence in sporting contexts has posed a further difficulty for the courts given that the bodily contact that takes place in most sports is sufficient to pass the threshold of assault or battery. This might explain the predominance of Canadian jurisprudence in the area of consent in sport, given the velocity, aggressive style of play, and average size of the players in both amateur and professional ice hockey games.<sup>487</sup> Echoing Lord Hale’s early consideration of the

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<sup>486</sup> This is arguably due to the higher level of violence which occurs in ice hockey games. As noted by Anderson (n 464), 756: ‘To a much greater depth than the applicable English jurisprudence, the Canadian courts have attempted, mainly through the frequency of prosecutions taken on foot of injuries sustained during ice hockey games to identify the circumstances when an accused might be held to have exceeded the scope of that exceptive (and implied) sporting consent.’

<sup>487</sup> Although some might envision American football to be a more dangerous game given the larger (on average) size of its players, a 2003 study done by researchers at the neurosurgical unit of Toronto’s St. Michael’s hospital found that ‘[d]irect fatality and injury rates for football are half those for hockey: 1.8 per 100 000 football players in high school and 7.0 per 100 000 in college. Nonfatal catastrophic spinal cord and brain injury rates are 2.6 per 100 000 hockey players and 0.7 per 100 000 football players among high school athletes’; A. Marchie and M.D. Cusimano, ‘Bodychecking and concussions in ice hockey: Should our youth pay the price?’ (2003) 169(2) CMAJ 124. These rates would presumably increase (for both sports) in the professional realm.

mental element in assessing criminal liability, both British and Canadian courts have struggled with determinations of intent amidst the common threshold-meeting injuries in heavy contact sports. As one Canadian court put it in *Green* (1971), the first case in history to see criminal charges laid against a professional (NHL) player for an in-game fight:

One now gets to the most difficult problem of all, in my opinion: since it is assumed and understood that there are numerous what would normally be called assaults in the course of a hockey game, but which are really not assaults because of the consent of the players in the type of game being played, where do you draw the line?<sup>488</sup>

The *Green* case concerned an altercation between Wayne Maki of the St. Louis Blues and Ted Green of the Boston Bruins. Both players were charged with assault following an on-ice fight, although neither case led to a conviction on the basis that the incident was construed as ‘part of the game.’ When acquitting Green, the court stated:

I think within our experience we can come to the conclusion that this is an extremely ordinary happening in a hockey game and the players really think nothing of it. If you go behind the net of a defenceman, particularly one who is trying to defend his zone, and you are struck in the face by that player's glove, a penalty might be called against him, but you do not really think anything of it; it is one of the types of risk one assumes.<sup>489</sup>

Five years later, a Manitoba court took judicial notice of the same difficulty in *Watson* (1975), a case involving a fight in a minor league hockey game:

Hockey is a fast, vigorous, competitive game involving much body contact. Were the kind of body contact that routinely occurs in a hockey game to occur outside the playing area or on the street, it would, in most cases, constitute an assault to which the sanctions of the criminal law would apply. Patently when one engages in a hockey game, one accepts that some assaults which would otherwise be criminal will occur and consents to such assaults. It is equally patent, however, that to engage in a game of hockey is not to enter a forum to which the criminal law does not extend. To hold otherwise would be to create the hockey arena a sanctuary for unbridled violence to which the law of

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<sup>488</sup> [1971] 16 D.L.R. (3d) 137, 142.

<sup>489</sup> *Green*, (n 488), 140.

Parliament and the Queen's justice could not apply. I know of no authority for such a proposition.<sup>490</sup>

This rhetoric of acts and intentions which would otherwise be considered criminal being merely 'part of the game' has circulated in Canadian courts' treatment of sports violence for decades.<sup>491</sup> In some instances, it has been used to establish the reasonableness of the players' actions or, in others, to vitiate their intent.<sup>492</sup> This contextual approach to consent in sport has been prominent in Canadian courts' treatment of in-game assaults and has been replicated in other Commonwealth jurisdictions. In the English Court of Appeal case of *Barnes*,<sup>493</sup> the Court (somewhat contentiously, as some have argued)<sup>494</sup> suggested the 'threshold level' for criminality in sporting contexts might not always be triggered by conduct that was 'outside the rules' nor even conduct that warranted 'being penalized... a warning or even a sending off.'<sup>495</sup> Rather, the court in *Barnes* made reference to a 1989 Canadian case, *Cey*, in an attempt to identify an objective test for this criminal threshold.<sup>496</sup> In *Cey*, the accused cross-checked<sup>497</sup> his opponent into the boards during an amateur ice hockey game, resulting in

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<sup>490</sup> (1975) 26 C.C.C. (2d) 150, [20]. Similar commentary can be found in the early English cases regarding the violent nature of football. For instance, Justice Hawkins in the 1898 case, *Bradshaw*, noted: 'Football is a lawful game, but a rough one, and persons who play it must be careful to restrain themselves so as not to do bodily harm to any other person': (n 471), 229. See also the judicial commentary in *Mayer* (1985), a Manitoba provincial court case involving a fight between the accused and another player in the course of a junior hockey game:

It is not injury that determines the existence of the crime of assault in hockey games, but rather it is the act itself and the circumstances under which the act is performed which is determinative of the existence of a crime... Lack of serious injury is often more luck and good fortune than intent and in the case before me, it is not thanks to the accused that extremely serious injury did not result from his attack on the complainant; [1985] 41 Man. R. (2d) 73 (Prov. Ct.), [15].

<sup>491</sup> American courts have adopted the same view of violence as 'commonplace' in hockey. See: *McKichan v. St. Louis Hockey Club, L.P.* 967 S.W. 2d 209 (Mo. Ct. App. 1998); and the commentary offered in P.K. Thornton, 'Rewriting Hockey's Unwritten Rules: *Moore v. Bertuzzi*' (2009) 61 Me. L. Rev. 205, 214-215.

<sup>492</sup> This was explicitly the case in *Green*, where the court held that the accused's act of swinging his stick at Maki was 'instinctive' and thus lacking in intent; see Note, (n 469), 161.

<sup>493</sup> *Barnes* (n 3).

<sup>494</sup> Anderson (n 464).

<sup>495</sup> *Barnes*, (n 3), [15].

<sup>496</sup> *Cey* (n 27).

<sup>497</sup> 'Cross-checking' is defined in the National Hockey League's Rulebook as: 'The action of using the shaft of the stick between the two hands to forcefully check an opponent' (Rule 59.1, NHL Official Ice

a number of facial injuries. The Saskatchewan Court of Appeal established a set of factors to be considered when assessing the defence of implied consent, each aimed at aiding the court in determining whether the activity in question involves ‘such a high risk of injury and such a distinct probability of serious harm as to be beyond what, in fact, the players commonly consent to, or what, in law, they are capable of consenting to.’<sup>498</sup> These factors represent a kind of modified objective test given their inclusion of the victim’s subjective state of mind as well as a series of other game-specific circumstances. The court in *Ciccarelli* phrased these as:

- (a) the nature of the game played; whether amateur or professional league or so on;
- (b) nature of the particular act or acts and their surrounding circumstances;
- (c) the degree of force employed;
- (d) the degree of risk of injury, and
- (e) the state of mind of the accused.<sup>499</sup>

These principles provide some frame for interpreting the legal preconditions that are applied to consent, namely knowledge, reasonableness, and voluntariness. The criminal law’s defence of consent has long recognised a person’s free will in consenting to particular activities; however, to be considered valid, consent must be given voluntarily. As was noted in Chapter One, this level of volition is assessed in conjunction with what a reasonable person can be considered to have done with the knowledge she had at the time. English courts have adopted this Canadian standard where, as Lord Mustill put it in *Brown* (1993), ‘some level of violence is lawful if the recipient agrees to it... enquiring whether the recipient could really have tacitly accepted a risk of violence at

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Hockey Rules). Online at: <<http://www.nhl.com/ice/page.htm?id=26351>>. Last accessed 19 December 2013. A ‘check’ is a defensive move employed to disrupt an opposing player’s possession of the puck.

<sup>498</sup> *Cey*, (n 27), [31].

<sup>499</sup> *Ciccarelli*, (n 27), 126. When the court applied these factors in *Ciccarelli*’s case (one involving an on-ice assault during a professional hockey game), the accused was found guilty, sentenced to one day in jail, and fined \$1000.

the level which actually occurred.’<sup>500</sup> This approach is not meant to override considerations of duress, where both force and threats of force will be regarded as sufficient to vitiate consent.<sup>501</sup> Nor is it meant to remove the possibility of findings of recklessness or wilful blindness – both of which would serve to negate a player’s ‘reasonable expectations.’<sup>502</sup> Instead, these findings represent negations of consent’s central components (i.e. knowledge, voluntariness, and reason). Consent operates when players can be shown to have known what the risks of injury were and voluntarily chose to engage in the activity for a ‘good reason’ (*Brown*).

How then to determine what players knew or ought to have known when participating in the sport? David Archard uses ‘game’ language explicitly when addressing this question in the broader context of consent’s operative scope. He contends:

the simplest and most plausible model [of consent] is that of ‘playing by the rules of the game.’ If I take part in an activity which is constituted by some set of rules, then I may be taken as agreeing to abide by those rules. More generally, I may be taken as agreeing to accept what, normally and reasonably, may be expected to follow from taking part in this rule-governed behaviour.<sup>503</sup>

Further, the case law reveals a practice of courts taking judicial notice of not only the official rules of the sport but also the ‘playing culture,’ which might include unwritten codes of conduct and player customs.<sup>504</sup> Many Canadian cases have explicitly recognised the physical nature of many contact sports will involve a certain degree of

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<sup>500</sup> *Brown* (n 27), 592H-593D; as cited in UK Law Commission Paper No. 134 (n 129), 21.

<sup>501</sup> See, for instance, the Canadian sexual assault case *R. v. Martin* (1980) 53 C.C.C. (2d) 250, where the court maintained ‘the line between using force to overcome a woman and using a serious threat to prevent her from offering resistance is too fine to be the basis of a legal distinction’ (256). This position has been widely accepted in English law as establishing the principle upon which consent is vitiated by consent; see UK Commission Paper No. 134, (n 129), 52.

<sup>502</sup> See *McSorley*, (n 28), where the Crown argued that if McSorley had not deliberately struck the victim in the head he had been reckless as to the danger of doing so. The court noted: ‘Recklessness in this case may be likened to wilful blindness - ignoring a known risk’ [60].

<sup>503</sup> Archard (n 49), 8.

<sup>504</sup> *Cey*, (n 27). See also: David Archard, “‘A Nod’s as Good as a Wink’: Consent, Convention, and Reasonable Belief” (1997) 2 *Legal Theory* 273.

‘routine body contact’<sup>505</sup> and players’ participation in the activity will be held to represent an implied consent to this bodily contact as well as other acts of aggression or violence which can be deemed to be ‘closely related to the play.’<sup>506</sup> As the court in the 1973 case, *Leyte* noted:

the players in competitive sport such as this game must be deemed to enter into such sport knowing that they may be hit in one of many ways and must be deemed to consent thereto so long as the reactions of the players are instinctive and closely related to the play and whether or not a foul is being committed.<sup>507</sup>

Unearthing these ‘unwritten’ players’ codes has proven to be a complex matter, demonstrated by two high-profile Canadian cases involving on-ice fights in NHL hockey games, *R. v. McSorley*<sup>508</sup> and *R. v. Bertuzzi*.<sup>509</sup> In the first instance, Marty McSorley was charged with assault with a weapon after having ‘slashed’ an opposing player, Donald Brashear, with his hockey stick.<sup>510</sup> Brashear fell to the ice, suffered a seizure, and lost consciousness, suffering from a grade 3 concussion.<sup>511</sup> In finding McSorley guilty, the trial judge took notice of the discrepancies presented at trial between the official position taken by the NHL (as per the Rulebook) that slashing was an illegal act in hockey subject to penalty and the position taken by McSorley and other players who submitted evidence that slashing was an accepted means of starting a fight – another illegal yet unwritten component to hockey, argued the defence. As the trial judge stated:

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<sup>505</sup> *Watson* (n 490).

<sup>506</sup> This was applied to an incident of violence that broke out between two handball players in the Canadian case, *R. v. Leyte*, [1973] 13 C.C.C. (2d) 458, where the accused knocked the victim into a wall and then hit him twice with his fists.

<sup>507</sup> *Leyte*, (n 506), 459.

<sup>508</sup> *McSorley*, (n 28).

<sup>509</sup> *Bertuzzi*, (n 448).

<sup>510</sup> ‘Slashing,’ according to the National Hockey League’s (NHL) Official rulebook (2010-2011) is ‘the act of a player swinging his stick at an opponent, whether contact is made or not’” The rulebook goes on to exempt ‘non-aggressive stick contact to the pant or front of the shin pads’ from penalty but asserts that ‘[a]ny forceful or powerful chop with the stick on an opponent’s body, the opponent’s stick, or on or near the opponent’s hands that, in the judgment of the Referee, is not an attempt to play the puck, shall be penalized as slashing’; (n 497), Rule 61.1.

<sup>511</sup> *McSorley*, (n 28), [59].



[T]hose written rules are only part of the picture. There is also an unwritten code of conduct, agreed to by the players and officials, that is superimposed on the written rules. This code of conduct deals mainly with situations where the written rules are breached, and the code then comes into play. For example, the written rules prohibit slashing with the stick, but the unwritten code says that slashing is permissible as long as it is during play, and not to the head... Another example deals with fighting.<sup>512</sup>

Fighting, although officially an illegal component to the game of professional ice hockey, is the subject of twenty-two rules in the NHL's Rulebook which examine and delineate various acts of on-ice aggression into the minutia.<sup>513</sup> Similarly, as Patrick Thornton has observed: 'The word "enforcer" or "hockey goon" does not appear in the... National Hockey League (NHL) rulebook. However, every player and coach knows the meaning of those words.'<sup>514</sup> The court in *McSorley* took note of the accused's frankness with respect to his role in the game and observed that '[i]t was his job to fire up the team, and he did so by fighting Brashear - obviously a formidable undertaking by which the other players should have been inspired.'<sup>515</sup> McSorley's claims of being an 'enforcer' on the team were not backed up at trial by his team, his coach, or the NHL, each of which maintained the position that fighting – and fighters – were not a

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<sup>512</sup> *McSorley* (n 28), [18-19].

<sup>513</sup> See Rules 46.1-46.22. Examples include dictations on which players drops his gloves first (46.11) or demonstrates a 'menacing attitude or posture' (46.11) as well as the removal of jerseys or penalties for not having a jersey 'tied down' during a fight; (n 497), Rule 46.13.

<sup>514</sup> Thornton (n 491), 206. Enforcers are players who are big, powerful, and adept at fighting but who are often critiqued for not being particularly skilled hockey players - although some distinction is made on this ground between enforcers and the less-skilled category of 'goons.' (Take, for instance, well-known 'tough guy,' Derek Boogaard, who over six seasons in the NHL, totalling 277 games, accrued 589 penalty minutes, took part in 174 fights, but scored only 3 goals in his entire professional career). Their role on a team is to protect lead scorers, intimidate opposing players and teams, and engage in on-ice fights when needed (to bolster team pride or retaliate for past attacks on key players.) Some scholars refer to these players as 'private rule enforcers,' alluding to their role in enforcing the unwritten code of violence and aggression that operates in hockey. One enforcer describes what 'success' in the league required of him: '[to] be a physical presence; have the ability to fight; have the gift of being able to win [fights] on a consecutive basis; hit; and be able to put fear in an opponent's eyes'; (Ted Simms, interview, 12 February 1997; as cited in M. Robidoux, *Men at Play: A Working Understanding of Professional Hockey*. (MQUP 2001), 136. See also: D. Schultz and S. Fisher, *The Hammer: Confessions of a Hockey Enforcer* (Summit Books 1981); R. Bernstein, *The Code: The unwritten rules of fighting and retaliation in the NHL*. (Triumph Books 2006).

<sup>515</sup> *McSorley* (n 28), [84]. The court goes further than this, observing that McSorley was ordered out onto the ice with only twenty seconds left in the game with the instructions to fight. 'There was no line change - he was the only player sent out. From his experience, and knowing his role on the team, this was a clear message to him to go out and finish things with Brashear' [86].

sanctioned or official part of hockey. McSorley was convicted of assault, suspended for the remainder of the season and one additional year, and never played in another NHL game again.

Four years later, a similar incident occurred during a game between the Vancouver Canucks and the Colorado Avalanche when Vancouver's Todd Bertuzzi punched Colorado's Steve Moore in the head from behind. Moore fell to the ice immediately and suffered fractures to two vertebrae, some facial lacerations, and a concussion.<sup>516</sup> Bertuzzi maintained he had been instructed to engage Moore in a fight in retaliation for a hit the Canucks' star player had received from Moore in an earlier game,<sup>517</sup> yet, similar to the *McSorley* case, 'hockey's unwritten rule dealing with enforcers and hockey's code of retaliation' was not recognised by the NHL.<sup>518</sup> Rather, Bertuzzi's team was fined \$250,000 by League and its commissioner, Gary Bettman, announced on an international sports television broadcast: 'The message we're sending is that this is not part of our game, it has no place in our game and it will not be tolerated in our game.'<sup>519</sup>

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<sup>516</sup> Bertuzzi, (n 448), [21].

<sup>517</sup> Thornton includes an excerpt from Bertuzzi's deposition in support of this view:

Q. And as I understand in the dressing room there's a board and it has the roster of the opposing team, it has all their names and numbers?

A. Yes there is.

Q. And by, when you say pointing, pointing at my client on the board, that he's actually pointing to Steve Moore, number 36?

A. Yes he was.

Q. All right, and can you tell me what his tone of voice was when he said it?

A. He wasn't obviously very happy, I think he was pissed off at everything that was going on to begin with. So obviously he was pretty angry.

Q. All right, and did that play a role in your decision to go after Steve Moore in the third period?

A. I think it influenced him being challenged by a lot of players yes; (n 491), 211.

<sup>518</sup> Thornton observes that '[l]eading up to the match, several Canucks made statements to the effect that they would retaliate against Moore. In fact, the threats became so well known that NHL Commissioner Gary Bettman and Executive Vice President and Director of Hockey Operations of the NHL, Colin Campbell, attended the game,' (n 491), 211.

<sup>519</sup> Rick Westhead, 'Bertuzzi Suspended for Season and Playoffs,' *New York Times*, (New York 12 March 2004) D1; as cited in Thornton (n 491), 208. Bettman has, however, publicly acknowledged fighting as part of the game in other places, see Thornton (n 491), 216. This paradox has not gone unnoticed by sports commentators. As Michael Farber notes:

So the rules of the NHL game of hockey consist of the written rules in the rulebook, a coexisting unwritten code of conduct impliedly agreed to by the players and officials, and guidelines laid down by the officials from game to game. It is within this somewhat indefinite framework that players must play the game.<sup>520</sup>

These cases reveal that the task of determining the parameters of what is 'reasonable' or 'normal' is both daunting and ripe for normative bias. Similarly, these factors do not work to remove what appears to be an over-riding principle of public policy considerations within the jurisprudence. As noted by the UK Law Commission in its 1994 Report on Consent:

The law clearly reserves the right to say that some activities do not qualify for special exemption at all; just as it reserves the right to say that, within a lawful sport, public policy requires that injury caused by some of the sport's practices, even though accepted by the injured player, should be dealt with as criminal in nature.<sup>521</sup>

The bodily contact incurred in physically demanding and fast-paced sports such as ice hockey, rugby, and (American) football is often more than sufficient to meet the threshold for criminal liability. Further, the level of violence in some sports is raised when the unwritten code of fighting as 'part of the game' is considered. Former NHL player and federal Member of Canada's Parliament, Ken Dryden, has commented on this component of the game, noting not simply the violent nature of hockey but that aggressive intent is an included characteristic of the game:

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The sickening irony is this: If before the mugging Moore had chosen simply to turn and fight Bertuzzi, who had been stalking Moore, tugging on his jersey and goading him throughout the third period of a lopsided game, Moore wouldn't have ended up face-first in a pool of his own blood with two broken vertebrae in his neck and a concussion. The two players could have pounded on each other for a while, and the world would have paid no notice. Because in the National Hockey League there is acceptable violence and unacceptable violence, a distinction that makes sense in the skewed, internal logic of the sport but is inexplicable to almost everyone outside the game's cocoon; (M. Farber, 'Code Red' *Sports Illustrated*, (New York 22 March 2004).

<sup>520</sup> *McSorley* (n 28), [24].

<sup>521</sup> UK Law Commission (n 129), 22-3.

What is the possible intent of hitting someone into the boards from behind, except to injure? There is no other understanding. The same for a hit to the head. You can stop someone dead in his tracks with a hit to the shoulder or hip. The only reason to hit someone on the head is to hurt him. Even if you say, 'Well, I didn't want to really hurt him,' you wanted to shake him up, put him off his game, intimidate him, just not put him in hospital. But the intent to injure is there.<sup>522</sup>

Still, the definition of these acts as 'harmful' depends on a judicial consideration of public policy and/or the perceived reasonableness of player expectations. How do these inform one another? Is public policy always reasonable? The jurisprudence in the area of sport and play provides an interesting case study for these inquiries. The court in the *McSorley* case declared some injuries too 'perverse' to be eligible for consent, stating 'there are some actions which can take place in the course of a sporting conflict that are so violent it would be perverse to find that anyone taking part in a sporting activity had impliedly consented to subject himself to them.'<sup>523</sup> Yet, despite the explicit recognition of in-game fighting among players and commentators of hockey, the courts have not always found such instances to fall within the reasonable expectations of play but nor have they equated in-game violence with the social disutility of fist-fighting (as was done in the barroom brawl case, *Jobidon*).<sup>524</sup> Something about violence in sport must be of 'use' to the state.

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<sup>522</sup> K. Dryden, 'Saving the Game' *Globe & Mail* (27 March 2004), A19. The court in *McSorley* concludes its judgment on the matter of intent as well (albeit by way of objectionable analogy):

He had an impulse to strike him in the head. His mindset, always tuned to aggression, permitted that. He slashed for the head. A child, swinging as at a Tee ball, would not miss. A housekeeper swinging a carpetbeater would not miss. An NHL player would never, ever miss. Brashear was struck as intended. Mr. McSorley, I must find you guilty as charged, (n 28), [108-109].

<sup>523</sup> *McSorley* (n 28), [70]. This was the same terminology employed by the House of Lords in *Brown* when dismissing the possibility of consent. See Lord Lowry's judgment: 'What the appellants are obliged to propose is that the deliberate and painful infliction of physical injury should be exempted from the operation of statutory provisions the object of which is to prevent or punish that very thing, the reason for the proposed exemption being that both those who will inflict and those who will suffer the injury wish to satisfy a *pervverted* and depraved sexual desire' (my emphasis).

<sup>524</sup> *Jobidon* (n 479).

In some of its earliest articulations, the rejection of the defence of consent to self-inflicted bodily harm reflected foundations of political liberalism where state legitimacy was grounded in the consent of its political subjects. Liberty was a sacred principle such that a person could consent to anything other than severing one's own limb(s). Blackstone's *Commentaries on the Laws of England* explains this was to prevent deprivation to 'the king of the aid and assistance of one of his subjects.'<sup>525</sup> Might contemporary public policy discourse within the case law be achieving the same end? Judicial treatments of consent in cases involving voluntary self-harm have emphasised the general principle that interference with individual liberty is justified only where a strong reason to do so exists, invoking language of the 'common good' or public interests to construct the content of this reason. How is the state's interest in producing and maintaining eligible subjects serviced by these configurations of 'harm'? The following sections attempt to probe these questions, reviewing the relationship between contact sports, ideals of masculinity, and the use of bodily capital.

### 'No Sissy Stuff': Harm and Hegemonic Masculinity in Sport

'Pain is one of hockey's measuring sticks.'

- Dave King, former coach of the Montreal Canadiens<sup>526</sup>

Play has long been recognised as a ground where cultural norms take root, where 'civilization arises and unfolds in and as play.'<sup>527</sup> This is, perhaps predictably, not a value-neutral process. A glance at other dominant social ethos, (Michael Oriard offers the examples of 'mass culture' or 'consumer culture') suggest ways that these are

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<sup>525</sup> *Wright's Case* (Leicester Assizes 1604), reported in J. Beale, *Cases on Criminal Law* (3<sup>rd</sup> edn, Harvard Law Review Publishing Assn 1915), 209; as cited in R. Binder, 'Consent Defense: Sports, Violence, and the Criminal Law' (1976) 13(2) *American Criminal Law Review* 235, 236.

<sup>526</sup> As cited in D. L. Feldman, 'Pandora's Box is Open: Criminal prosecution implemented; Violent play in the National Hockey League eliminated' (2003) 2(2) *Va. Sports & Ent. L.J.* 310, 317.

<sup>527</sup> J. Huizinga, *Homo Ludens: A Study of the Play-Element in Culture*. (Beacon Press 1950), ix.

‘rooted in conspicuous playfulness of a kind that Huizinga considered not truly playful at all.’<sup>528</sup> Rather, they provide a structure or schematisation for human relations – a frame for interpreting (and prescribing) specific subjectivities and their ontologies. ‘Norms articulate knowledge and power, cognitive and normative expectations, and this articulation is reflexive; normative expectations make the world visible in a particular way.’<sup>529</sup> Histories of play detail how its coerced systematisation has been employed to discipline social relations or alter cultural assumptions.<sup>530</sup> Fundamentally understood as an activity that is ‘not serious’ and immersed in the realm of the imaginary, play can be posited as outside of or apart from ‘reality.’ This allows it to be understood as timeless, ahistorical, and apolitical and thus easily positioned as ‘objective’ and authoritative about social life. Play is able to assume a presocial status, fortifying it against critique – it is simply ‘natural’ or ‘always been this way.’<sup>531</sup> In this way, play and its organisational structure of human roles and relations becomes common sense.<sup>532</sup> These common assumptions, in turn, inform judicial interpretations of the reasonable expectations players of a game might have about its inherent risks and acceptable levels of harm – key components to the delineation of the defence of consent’s scope.

Perhaps one of the most prevalent components of this ‘common sense’ is a prescriptive form of masculinity. Sport and play have long been recognized as formative places for

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<sup>528</sup> M. Oriard, *Sporting with the Gods: The Rhetoric of Play and Game in American Culture* (CUP 1991), x.

<sup>529</sup> A. Pottage, ‘Foucault’s Law by Ben Golder and Peter Fitzpatrick (review)’ (2011) 74 *Modern LR* 159, 160.

<sup>530</sup> Michael Thomson notes how modern sporting beliefs can be traced to the public school system of 19<sup>th</sup> Century England, where ‘folk games were sequestered and transformed by a ruling-class ethos that demanded order and standardization’; (n 454), 129.

<sup>531</sup> Judith Butler has cautioned that the ‘invocation of a nonhistorical ‘before’ becomes the foundational premise that guarantees a presocial ontology of persons’ (n 11), 5.

<sup>532</sup> Thomson, remarking on the Victorian education system and its standardization of play into school sport, suggests ‘[t]he Victorians translated these learnt understandings of what sport meant into common sense cultural assumptions’ (n 454), 120.

the development and entrenchment of gender schematics.<sup>533</sup> Working from Judith Butler's formulation of gender as a performance, sex roles are understood not to be stable signifiers of a particular way of being but rather 'repeated stylization[s] of the body... within a highly rigid regulatory frame that congeal over time to produce the appearance of substance.'<sup>534</sup> Certainly, the organisation of play into modern sport meets the requirement of just such a frame of social (and ontological) regulation. In particular, sport's contributions to cultural understandings of masculinity have served as an operative means of privileging some subjects while excluding others. As Rowe et. al. have remarked, 'sport has been one of the most significant means by which gender boundaries have been marked.'<sup>535</sup> Michael Thomson employs the example of the public school system of the Victorian period to highlight how values of aggression, competitiveness, order, and discipline were pitted as ideals of masculinity through the introduction of organised sport in the curriculum. He notes that 'the Victorians moved to more firmly secure the feminine within the sphere of the home and of reproduction. Her physical frailty and weakness left her unfit for challenging exercise and the rigors of sport. The competitive public arena was naturally the world of men.'<sup>536</sup> Christine Skelton, remarking on the same period, notes how football was viewed (by the capitalist class) as 'beneficial' to working class men as it kept them 'away from the pubs after collecting their wages Saturday lunchtime.'<sup>537</sup> This view has been furthered by other scholars who have suggested the incorporation of football in physical education

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<sup>533</sup> Huizinga does note a difference between 'sport' and 'play' (or 'games') that reflects the former's relation to capitalist interests. This is explored in further detail in this chapter's third section; Huizinga (n 527), 222-223.

<sup>534</sup> Butler (n 11), 43-44.

<sup>535</sup> D. Rowe, et. al. 'Panic Sport and the Racialized Masculine Body' in J. McKay, M.A. Messner, and D. Sabo (eds) *Masculinities, Gender Relations, and Sport*, (Sage Publications 2000), 249.

<sup>536</sup> Thomson (n 454), 129.

<sup>537</sup> C. Skelton, "'A Passion for Football': Dominant Masculinities and Primary Schooling' (2000) 5(1) *Sport, Education, and Society* 5.

curriculum at the public school level served as a 'political strategy to teach upper and middle class males to be leaders and to induce discipline in working class males.'<sup>538</sup>

The encouragement of young boys to participate in sport while young girls are expected to take up more passive activities didn't end with the Victorian era, as many scholars of sex segregation in education and athletics maintain.<sup>539</sup> While the explicit division between male and female roles in physical activity are not as overtly orchestrated in modern sport, studies of both sport participation and the 'business' of sport (including its televised coverage and the professional careers it offers) continue to be male-dominated regimes.<sup>540</sup> As masculinities scholar, Michael Kimmel, has noted: 'Sports has become both metaphor and reality of American masculinity – its language dominates other discourses as metaphor, while sports have become increasingly important among young boys as the arena of demonstration and proof.'<sup>541</sup>

This postulation of the sports arena as a 'proving ground' for young men has an extraneous effect of establishing particular traits of male superiority for both on and off the field.<sup>542</sup> R.W. Connell has explained how these cultural accounts of gender can adhere to produce behavioural codes which dictate not simply how one should act but effectively who one is.<sup>543</sup> This marks the normative quality of definitions of masculinity which serve to offer a standard of what men *ought* to be, often with reliance on

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<sup>538</sup> Skelton (n 537), 7; referring to S. Delamont, *Sex Roles and the School* (Methuen 1980); and C. Heward, *Making a Man of Him* (Routledge 1988).

<sup>539</sup> See: D. S. Cohen, 'No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity' (2009) 84 *Indiana L.J.* 135; and also D. Cohen, 'Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity' (2010) 33 *Harv. J. Law & Gender* 509; and R.W. Connell 'Masculinity Construction and Sports in Boys' Education: A framework for thinking about the issue' (2008) 13(2) *Sport, Education, & Society* 131.

<sup>540</sup> See, for example: M. A. Messner, et al, 'The Televised Sports Manhood Formula' (2000) 24 *Journal of Sport and Social Issues* 380.

<sup>541</sup> M. Kimmel, 'Foreword' in Messner and Sabo (n 535), xiii.

<sup>542</sup> Thomson (n 454).

<sup>543</sup> R.W. Connell, *Masculinities* (Polity Press 1995).



essentialist understandings of sex roles and differences. These traits can be seen to inform judicial assessments of the kinds of activities that can be considered ‘rational’ or desirable for men to engage in, which, in turn, serve to establish the limits of the consent defence in sports violence cases. Perhaps more insidious, however, is the role the consent-as-autonomy story plays in cementing this idealized subjectivity. Connell’s theory of hegemonic masculinity maintains that not all masculinities are equally practiced, valued, or even available. Instead, it is hegemonic masculinity that ‘in any given setting, [is] the pattern of masculinity which is most honoured, which is most associated with authority and power, and which – in the long run – guarantees the collective privilege of men.’<sup>544</sup> When assessing the ‘reasonableness’ of harm incurred during a sporting activity, courts will often rely on these idealized traits of ‘manliness’ when determining that a player’s ‘choice’ to subject himself to in-game violence is not simply a rational exercise of his autonomy, but a culturally desirable one, thus establishing such forms of harm as having sufficient social value.

One of the dominant examples of these normative frameworks of masculinity was provided in Robert Brannon’s oft-cited ‘blueprint of manhood’ wherein he offers a four-fold typology of idealised forms of male roles, each of which can be actively seen in sport, particularly the culture of high-contact sports.<sup>545</sup> Brannon’s criterion of ‘no sissy stuff’ is sometimes cited as the ‘first and foremost’ principle of idealised masculinity.<sup>546</sup> It demands the rejection of all things ‘feminine,’ where femininity is understood to be weakness, passivity, and emotional sensitivity.<sup>547</sup> Men must not resemble women in

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<sup>544</sup> Connell (n 544), 133.

<sup>545</sup> R. Brannon, ‘The male sex role: Our culture’s blueprint for manhood, what it’s done for us lately’ in D. David and R. Brannon (eds), *The forty-nine percent majority: The male sex role*. (Addison-Wesley 1976).

<sup>546</sup> M. Kimmel, ‘Issues for Men in the 1990s’ (1992) 46 U. Miami L.Rev. 671, 674.

<sup>547</sup> Sadly, while Brannon’s framework is more than thirty-five years old, ample evidence exists to suggest these notions of hegemonic masculinity continue to find audience today. A 2011 commentary by *National*

their appearance or emotive responses, thus giving minimal attention to hygiene, body work, and physical attire.<sup>548</sup> By way of contrast, Sandra Bartky has remarked on the idealised form of femininity at work in appearance norms for women. She notes that '[a] woman's skin must be soft, supple, hairless, and smooth; ideally, it should betray no sign of wear, experience, age, or deep thought.'<sup>549</sup> Hegemonic masculinity requires the adoption of an opposite aesthetic, where physical 'wear and tear' is heralded as the mark of a 'real man.' This conforms to Brannon's criterion that 'real men' engage in an ethos of 'give 'em hell,' exalting hostility and risk taking. Men are expected to 'exude an aura of manly daring and aggression' while aiming for power, thrills, and success ('the big wheel') which are often measured in capitalist terms.<sup>550</sup> Further, they are expected to do this as 'a sturdy oak,' showing little to no emotions, specifically, vulnerability.

Many scholars have noted the ill-effects each of these ideals can have on men's health, often as a result of normative pressure to conceal illness, refrain from discussing symptoms, and refusal to seek medical advice or treatment.<sup>551</sup> In some instances, the demand for player toughness and the presumption that professional athletes are expected to 'play through the pain,' has been the basis for claims of civil negligence, where these idealised forms of masculinity form a central part of judicial treatments of

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*Post* columnist, Christie Blatchford, entitled 'Where Have All the Manly Men Gone? Toronto, City of Sissies' laments the 'male as delicate creature' after witnessing a group of 10-12 year old boys greeting one another with (gasp!) hugs. She explicitly links this deficiency in masculinity to a lack of sporting prowess, suggesting 'Toronto likes its men delicate, slender and arch, not sportif unless le sport in question is maybe badminton'; 10 December 2011 (A29).

<sup>548</sup> Sandra Bartky's work links (women's) appearance work to a Foucauldian conception of discipline to suggest ways in which regimes of diet, exercise, and beautification produce 'docile bodies.' Arguably, these same standards (when coupled with normative definitions of masculinity) have the same disciplinary effect on men; S. Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression*. (Routledge 1990).

<sup>549</sup> Bartky (n 548), 98.

<sup>550</sup> Michael Kimmel describes 'the big wheel' ideal as 'he who has the most toys when he dies, wins'; (n 546), 674.

<sup>551</sup> See, for example: W. H. Courtenay, 'Constructions of masculinity and their influence on men's well-being: A Theory of gender and health' (2000) 50(10) Soc. Sci. Med. 1385.

‘reasonableness.’ In the case, *Brady v. Sunderland Association Football Club Ltd.*,<sup>552</sup> the Court of Appeal dismissed the plaintiff’s claim for damages for the club’s breach of duty in failing to address his complaints of injury. In determining that the club had not failed to meet its requisite standard of care, the Court held that the football club’s assumptions (that the player’s injuries were not as serious as he made out) were reasonable, particularly in light of the rarity of the plaintiff’s condition and the inconsistency with which the player complained about the pain. This finding was reached despite the Queen’s Bench Division decision explicitly acknowledging evidence that when the player complained of pain, he was admonished by his coach for having a ‘bad attitude’ and demonstrating a poor work ethic. As cited from the plaintiff’s witness statement:

[The coach] was telling me that I had an attitude problem and in particular in relation to training. I didn't really realise there was something physically wrong. I just wasn't able to keep up all the time. From time to time I would try and explain to him in training sessions why I was unable to keep up but he did not want to listen and told me it was to do with my attitude. Over the following month his opinion about my attitude seemed to harden... He told me that he wasn't going to put up with any more nonsense. He told me that I couldn't stop and to keep going. He then sent the other players off in a different direction and he ran with me along the coast lecturing me about my attitude and telling me I just didn't like hard work.<sup>553</sup>

A further (and often most prominent) component of hegemonic masculinity is compulsive heterosexuality, denoted most often by an explicit rejection of homosexuality. Similar to the proscription against ‘sissy stuff,’ idealised masculinity often asserts itself through homophobia and the characterisation of non-conforming males as gay.<sup>554</sup> Kimmel, in his research on this issue, cites an interview with rap

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<sup>552</sup> [1998] EWCA Civ 1780.

<sup>553</sup> [1998] QBD 2 April 1998 (transcript), citing from plaintiff’s witness statement, [11].

<sup>554</sup> See Michael Kimmel ‘Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity’ in Nancy Cook (ed) *Gender Relations in Global Perspective: Essential Readings* (Canadian Scholars Press 2007).

musician, Eminem, to illustrate the social authority of hegemonic masculinity's

heterosexist script:

The lowest degrading thing that you can say to a man... is to call him a faggot and try to take away his manhood. Call him a sissy. Call him a punk. 'Faggot' to me doesn't necessarily mean gay people. 'Faggot' to me just means taking away your manhood.<sup>555</sup>

This practice is prominent in sports rhetoric both among players and sports commentators. The requirement within hegemonic masculinity that men 'give 'em hell' has led some masculinities scholars to suggest that '[v]iolence is the single most evident marker of manhood.'<sup>556</sup> The use of the moniker 'Cindy' among online critics to describe professional hockey player, Sidney Crosby, when observations about his playing style and behaviour fail to conform to the 'tough guy' ideal of masculinity, serves as a good example.<sup>557</sup> After Crosby (a player who is widely recognised as the top player in the league)<sup>558</sup> suffered a severe concussion following hits to the head in back-to-back games during the 2010-2011 season, he was removed from the playing roster for over ten months, prompting remarks that he was a 'wimp' who was failing to 'man up.'<sup>559</sup> Similarly, identical Swedish twins Henrik and Daniel Sedin, who both play ice

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<sup>555</sup> R. Kim, 'Eminem – Bad Rap?' *The Nation*, 5 March 2011, 5; as cited by Kimmel, Michael and Matthew Mahler. 'Adolescent Masculinity, Homophobia, and Violence: Random School Shootings, 1982-2001' (2003) 46 *American Behavioral Scientist* 1439, 1445-6.

<sup>556</sup> Kimmel (n 554), 215.

<sup>557</sup> Allain observes these comments often pertain to allegations that Crosby is a 'whiner,' noting that '[d]uring the 2008/09 playoffs, The *Ottawa Citizen* directed their readers to "(a) sign in the arena (that) said: 'I Whine Less Than Crosby,' held by a baby"... While another fan jokes, "If Cindy [*sic*] Crosby keeps on whining, crying and wimping out, he'll get a good talking to by Don (Cherry)"; K. Allain, "'Kid Crosby or Golden Boy: Sidney Crosby, Canadian national identity, and the policing of hockey masculinity' (2011) 46 *Int. Review for the Sociology of Sport* 3, 15.

<sup>558</sup> Crosby's achievement records include being the youngest player to lead the NHL in scoring as well as the youngest captain to lead his team to a Stanley Cup championship (and win it). He has also played the fewest games among any lead scorer in NHL history. Given his age (provided he has a long and healthy playing career), he is expected to out-perform Wayne Gretzky as the world's greatest hockey player. Gretzky himself opined (during Crosby's years in the amateur leagues) that he expected Sidney could break his playing records, adding he was the best player Gretzky had known since Mario Lemieux; Gare Joyce, *Sidney Crosby: Taking the Game by Storm*. (Fitzhenry & Whiteside 2005).

<sup>559</sup> See M. Waterloo, 'Sidney Crosby out indefinitely again with concussion symptoms' *Ohio Valley Athletics*, 12 December 2011, online at: < <http://www.ovathletics.com/home/sidney-crosby-out-indefinitely-again-with-concussion-symptoms/9254>>, last accessed: Dec 9, 2013; and also M. Halford, 'Primeau calls Crosby "Ambassador for people who have brain injuries"' *NBC Sports Online*, 13

hockey for the Vancouver Canucks, were labelled the 'Sedin Sisters' by sports media and opposing players for failing to initiate physical contact with players on the ice.<sup>560</sup>

North America's recent debate about the role of fighting in ice hockey has also sparked rhetoric that reinforces these idealised notions of maleness where 'good' players are expected to take risks, not shy away from on-ice violence, and 'play through the pain.'<sup>561</sup> This attitude is well evidenced in CBC sports commentator Mike Milbury's (rather offensive) lament in 2009 that banning fights in hockey would lead to the 'pansification' of the sport.<sup>562</sup>

This relationship between the sporting world, manhood, and homophobia has been identified by some scholars as forming a kind of 'sporting masculinity,' where

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December 2011, online at: < <http://prohockeytalk.nbcsports.com/2011/12/13/primeau-calls-crosby-ambassador-for-people-who-have-brain-injuries/>>, last accessed: Dec 7, 2013, where a former NHL player heralds Crosby's courage in refraining from play while injured. Keith Primeau states: 'The culture we're brought up in with the hockey world just tells us to play through injuries. That may seem like courage, but it really isn't.' One of the article's commentators, kingjoe1, remarks: 'I hope Crosby does retire. I am tired of him whining about a little headache.'

<sup>560</sup> Pierre LeBrun, 'Surprised by Sedin? You shouldn't be' *ESPN NHL*, 3 February 2010. Online at: < [http://sports.espn.go.com/nhl/columns/story?columnist=lebrun\\_pierre&id=4883674](http://sports.espn.go.com/nhl/columns/story?columnist=lebrun_pierre&id=4883674)>, last accessed: Dec 7, 2013; and Adam L. Jahns, 'Dave Bolland calls Sedin brothers "sisters"' *Chicago Sun-Times* (Online), 14 December 2011. Online at: < <http://www.suntimes.com/sports/hockey/blackhawks/9449165-419/dave-bolland-calls-sedin-brothers-sisters.html>>, last accessed: Dec 7, 2013. The Sedin brothers have also been called 'Thelma and Louise' by hockey commentator, Mike Milbury, to which Daniel Sedin remarked 'We don't really worry about those kind of comments. He made a bad comment about us, calling us women. I don't know how he looks at women. I would be pretty mad if I was a woman' as reported by Eric Duhatschek, 'Canucks' Sedin Brothers rebuff Mike Milbury after Thelma and Louise jab' *Globe and Mail* (Online), 11 June 2011 at: < <http://www.theglobeandmail.com/sports/hockey/globe-on-hockey/canucks-sedin-brothers-rebuff-mike-milbury-after-thelma-louise-jab/article2057291/>>. Last accessed: December 10, 2013. As Kristi Allain has suggested: 'As Canadian national identity is tied to men's ice hockey, it is not surprising that particular styles of masculinity – that is, hard hitting, fearless and aggressive play – are privileged over what is considered to be more effeminate ways of expressing masculinity – that is, skating, passing and other skilled maneuvers'; (n 557), 13.

<sup>561</sup> As noted by Messner et. al. (n 540), 387:

Athletes who are 'playing with pain,' 'giving up their body for the team,' or engaging in obviously highly dangerous plays or manoeuvres were consistently framed as heroes; those who removed themselves from games due to injuries had questions raised about their character, their manhood.

The impact of these attitudes on younger players has also been noted. A CTV news report in 2011 noted how '[t]he self-denial, the desire to be tough, to play through the pain, is something that junior players do to imitate professionals' CTV Montreal, 'Special Report: Skull and Crosschecks' *CTV News Online*, 10 February 2011. Online at: < [http://montreal.ctv.ca/servlet/an/local/CTVNews/20110206/mtl\\_concussions\\_SR\\_020611/20110210](http://montreal.ctv.ca/servlet/an/local/CTVNews/20110206/mtl_concussions_SR_020611/20110210)>, last accessed: Dec 7, 2013.

<sup>562</sup> As reported in W. Houston, 'Gay rights group outraged by CBC's use of "pansification"' *Globe and Mail*, 28 January 2009.

hegemonic masculine ideals are bolstered through and within sport.<sup>563</sup> Not only does sports rhetoric and playing culture dictate how young boys are to become men through its rules, commentary, and direct instruction, it also cements hegemonic understandings of men as tough, aggressive risk-takers by admonishing alternative models of ‘being male.’ This is found explicitly in the juridical treatment of ‘harm’ in decisions addressing the defence of consent in incidents of sports violence, where ‘harm’ is configured as a failure to enact hegemonic masculinity. The *Brown* (1993) case offers one of the clearest instances of this (re)construction of the harm principle where, as Thomson suggests, ‘sporting language and imagery is deployed in a judicial setting to distance, marginalise, and ultimately penalise an already subordinate masculinity.’<sup>564</sup> The subordinate masculinity in *Brown* was, of course, homosexuality, further complicated by the introduction of consensual sadomasochistic activity. Interestingly, an initial analysis might suggest the acts of the appellants in *Brown* conform to a number of ideals of hegemonic masculinity. Participants enthusiastically engaged in aggressive acts of violence where the risk of injury was ‘played through’ by a group of men seeking thrills and power. These events took place over a ten year period during which time no participant had ever sought medical treatment for any of the injuries they sustained nor voiced complaint about the events or ‘wimped out.’<sup>565</sup> Yet, the court in *Brown* goes to great lengths to move the behaviour of the appellants away from the domain of hegemonic masculinity which, as Thomson has argued, is accomplished by

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<sup>563</sup> Thomson (n 454).

<sup>564</sup> Thomson (n 454), 135.

<sup>565</sup> Charges in *Brown* were laid after police found videotaped evidence of the accused persons’ activities during a search on an unrelated matter. None of the participants themselves had filed a complaint or sought police action.

constructing the appellants as not simply ‘unmanly,’ but also unhealthy.<sup>566</sup> This is a familiar technique for the maintenance of hegemonic masculinity:

The ‘homosexual’ becomes one who has transgressed the boundaries not only of the sexual, but also of the civilized, through acts of depravity that require the reaffirmation of social norms. The events are symbolic in that they reaffirm definitions of normalcy, and are designed to expurgate the gay men from the realm of the social to a pathologised sphere of decay, illness, and to an unavoidably brutal, and ironically, seductive death.<sup>567</sup>

Given this construction, ‘consent’ must be removed from the appellants’ capacity. It is the marker of the normal, the civilised, the ‘man’ of contemporary society. To leave the ‘homosexual’ eligible to consent would be to disrupt the frame of exclusion and privilege necessary for the preservation of an idealised masculinity – not unlike the disavowal of autonomy among those without sufficient status in Ancient Greece. Thus, despite sadomasochism’s valorisation of pain, toughness, violence, and the enjoyment thereof, the court in *Brown* is unable to reconcile this with the heterosexual demands of hegemonic masculinity. Instead, the court distances the appellants’ conduct from the acceptable and ‘reasonable’ forms of violence that occur in organised sports on the basis of the former’s lack of masculinity. Not only is the appellants’ activity without ‘good reason,’ but it is deemed to be against the public’s interest on the basis that its deviation from the ‘manly diversions’ of sport and skills contests, and thus is unhealthy and harmful.<sup>568</sup>

*Brown* is a case which has received significant criticism from legal scholars and commentators, particularly with respect to what is perceived to be blatant homophobia

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<sup>566</sup> Thomson (n 454), 136. For further examination of how ‘sporting sexuality’ is policed, see the work of Shari Lee Dworkin and Faye Linda Wachs on HIV-positive athletes: “‘Disciplining the Body’: HIV-Positive Male Athletes, Media Surveillance, and the Policing of Sexuality” in S. Birrell and M.G. MacDonald (eds) *Reading Sport: Critical Essays on Power and Representation*. (Northeastern University Press 2000).

<sup>567</sup> C. Stychin, *Law’s Desire: Sexuality and the Limits of Justice* (Routledge 1995), 117.

<sup>568</sup> This is made explicit in the *Brown* judgment when the court cites Swift J in *Donovan*; (n 27).

in the court's reasoning.<sup>569</sup> Contrasting judicial approaches to other forms of 'rough horseplay' outside of the sadomasochistic realm, however, reveals similar considerations of harm and hegemonic masculinity. The *Jones* (1986) case involved a group of teenaged boys on a youth club playground.<sup>570</sup> The older boys in the group took hold of two younger children and after some brief 'play fighting' (as one of the participants described it) involving a headlock, some punching and some kicking, managed to throw the two young boys in the air. Each landed on the ground, one suffering a ruptured spleen (which required immediate surgery and hospitalisation) and the second, a broken arm. In exempting the activity from criminal liability on the basis that it fell within the established grounds of 'horseplay,' the court argued this was merely an example of typical boyhood mischief. While recognising the activity was likely to cause injury, the court dismissed the need for criminal sanction, suggesting that:

though they anticipated that they might get the odd bruise, *as boys do in playground roughness...* [t]hey thought that it was being taken as a joke by their victims. True, their victims protested and claimed that they were being hurt, but that was common form among the boys in order to achieve an escape.<sup>571</sup>

A similar approach was taken in the (1992) case, *R. v. Atkin*, where the appellants were officers in the Royal Air Force who were celebrating the conclusion of their flight training.<sup>572</sup> After consuming a large quantity of alcohol, the appellants began to set fire to the fire resistant suits of two officers who, the court relays, 'treated it as a joke.'<sup>573</sup> Later in the night, one of the officers indicated he was retiring to bed at which point the appellants poured white spirit on the victim and ignited it, resulting in serious burns. In

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<sup>569</sup> This argument was specifically made at the European Court of Human Rights (ECHR) when it was alleged that a contrast between *Brown* and the *Wilson* (1996) case revealed a bias in English law against homosexuals. The ECHR, however, rejected this contention; see: Anderson (n 464), 99.

<sup>570</sup> (1986) 83 Cr App R 375.

<sup>571</sup> *Jones*, (n 570), 377 (my emphasis).

<sup>572</sup> [1992] 1 W.L.R. 1006.

<sup>573</sup> *Atkin* (n 572), 1009.



characterising these events as ‘rough and undisciplined horseplay,’ the court suggested that the victim’s ‘knowledge of the course which celebration evenings such as the one in question was likely to take and his continued presence with the others demonstrated an acceptance by him that horseplay of the nature perpetrated upon him might well take place.’<sup>574</sup> It is hard to imagine the court taking this approach to implicit consent (while sleeping) in any other instance of criminal assault without reliance on normative understandings of masculinity and ‘horseplay.’<sup>575</sup>

Judicial use of the ‘rough horseplay’ exception in defence of consent cases has garnered significant criticism among legal commentators, some suggesting it amounts to nothing more than a ‘bully’s charter.’<sup>576</sup> Their position highlights the juridical practice of equating ‘harm’ with non-conformity to hegemonic masculinity by placing it in a context of homophobia:

This seems to be a bully's charter. It is extremely far-fetched to suggest that boys being held by several others **to prevent them running away** are genuinely consenting to being thrown in the air. To say that boys in such a situation can consent to **grievous bodily harm**, but that sado-masochists, who are genuinely consenting, cannot consent to **actual bodily harm** provides an interesting insight into the way some of our judiciary view the world. Violence in the playground or barrack room is what is expected and normal in the male world; it is a ‘manly diversion’. Two men wishing to express their sexuality together and in private are not doing the sort of thing ‘real men’ do. It is an ‘evil thing’ and ‘uncivilised’ and cannot be the subject of valid consent.<sup>577</sup>

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<sup>574</sup> *Atkin* (n 572), 1020. The fact that the victim’s ‘continued presence’ took place while he was asleep is not mentioned by the court.

<sup>575</sup> In at least one recent case, *R. v. J.A.* (2011), the Supreme Court of Canada has explicitly ruled against this view of tacit consent. J.A., while engaged in consensual sexual intercourse with his partner, K.D., placed his hands around her neck and choked her until she was unconscious. K.D. testified to having consented to the choking but the Court disallowed the possibility of consent being present while in an unconscious state, (n 149).

<sup>576</sup> C. Clarkson and H. Keating, *Criminal Law: Text and Materials*, (5<sup>th</sup> edn, Sweet & Maxwell 2003), 295.

<sup>577</sup> Clarkson and Keating (n 576), 295-296; as cited in Alan Reed, ‘Case Comment: Non consensual horseplay and involuntary manslaughter’ (2005) 157 *Criminal Lawyer* 1, 2 (emphasis in original). Reed makes a similar comment about these cases, suggesting ‘[t]he courts apparently believe that young people have a need for the sort of rough horseplay that occurs in school playgrounds and in military barracks, usually among males’ (2).

This association of social violence that would normally trigger the criminal law with the ‘rough horseplay’ that common law exemptions have recognised is often an explicitly gendered one. Take, for instance, the Canadian (2006) case, *R. v. Beahm*, where the accused held a knife to an employee’s throat while on the job.<sup>578</sup> Although the court did not allow the defence of consent, it was not on the grounds that this behaviour fell outside the ambit of allowable social violence but instead was untenable given the surrounding circumstances and their influence on what the victim could reasonably have expected.<sup>579</sup> The judgement situates the inquiry within the context of hegemonic masculinity from the onset, opening with the following paragraph:

The fishing industry in Newfoundland and Labrador was traditionally dominated by males. As such these males, in attempts to show their male prowess or for other male generated reasons, would at times engage in verbal and physical jousting in the work place. This would take the form of verbal comments, both in general and more colourful language, and in everything from minor poking and bumping of one person against another to more engaging physical activity.<sup>580</sup>

These cases suggest the ways in which dominant understandings of masculinity are used to distinguish allowable forms of violence from those which will incur criminal liability. These views of ‘manliness’ are often positioned as so commonplace, so ‘natural’ as to be beyond explanation – they are merely the expected outcomes of ‘male community life.’<sup>581</sup> Sport remains an essential component of this male community where it is often ‘mobilized as a signifier of appropriate (that is, hegemonic) masculinity.’<sup>582</sup> Thus, where the horseplay of young men can be likened to sport (with allusions to rules or

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<sup>578</sup> [2006] N.J. No. 207.

<sup>579</sup> These included that the accused and complainant were not friends, had not wrestled or ‘jousted’ in the past, and that some animosity was observed after the incident. The court also makes multiple mentions of the accused’s non-Canadian citizenship, perhaps to disassociate him from the local context or culture (wherein such ‘male prowess’ took place).

<sup>580</sup> *Beahm* (n 578), 207.

<sup>581</sup> Interesting to note is Lord Mustill’s language in this characterisation of ‘male community life’ where he suggests the ‘criminal law cannot be *too tender* about the susceptibilities of those involved,’ invoking notions of Brannon’s ‘no sissy stuff’ ideal; (n 27), 110.

<sup>582</sup> Thomson (n 454), 139.

‘tacitly agreed understandings or conventions’),<sup>583</sup> consent is permissible. Further, the invocation of consent works to naturalise these ideals by positioning the activity as one which the participants *chose* to partake in. Consent serves as the ‘badge’ or public statement of a masculinity that assumes risk, endures pain, and welcomes violence without complaint or sign of vulnerability. But it is only in circumstances where these traits are enacted in ways that do not challenge hegemonic masculinity that they are deemed not to be ‘harmful’ or contrary to public policy. What socially utile end does this ‘ideal man’ serve?

The following section examines how this cultural conditioning of the traits of desirable masculinity is deployed in service to state interests of capitalism. It explores a second juridical construction of harm in consent sports cases, i.e. the misuse of body capital.

### Capitalism with the Gloves Off: Consent and Body Capital in Sport

‘These guys are trading money for brain cells.’

- Chris Nowinski, former Harvard football player and professional wrestler<sup>584</sup>

For as much as sport can be seen as a forum for the construction and maintenance of cultural understandings of masculinity, it is arguably even better understood as a site of struggle – between winners and losers, participants and spectators, amateurs and professionals, and élite and populist classes of activity.<sup>585</sup> Moreover, these struggles are both political and corporeal, waged with certain authorized bodies and with certain uses

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<sup>583</sup> *Blake v. Galloway* [2004] 3 All E.R. 315. In this case, two teenagers were throwing bark chippings at one another until one of them (Blake) was hit in the eye causing serious injury. The court exempted the action from liability on the grounds that ‘[t]he horseplay had been conducted in accordance with tacitly agreed understandings or conventions which were objectively ascertainable by [the victim],’ thus distancing the acts from recklessness or willful blindness – a move not unlike much of the judicial rhetoric on fighting conventions in contact sports.

<sup>584</sup> As reported in Branch, (n 449).

<sup>585</sup> P. Bourdieu, ‘Sport and social class’ (1978) 17 *Social Science Information* 819.

of those bodies. Like any exercise of disciplinary power, sport employs expert knowledge to facilitate desired outcomes of these struggles, including medical professionals, coaches and trainers, and in some instance, the courts.<sup>586</sup> Further, the professional sports associations and administrative bodies that govern sporting activities are vested with the power to discipline players and practices that might fail to conform to official (and unofficial) rules of play. As was noted within the context of sport's role in enforcing ideals of hegemonic masculinity, often these 'rules of play' implicate behaviour off the field where players are expected to conform to standards of 'toughness' with a stoic tolerance of pain. These standards are enforced through both formal and informal social controls, the latter of which often proves the most influential. Concealing injuries and 'playing through the pain' are not simply expected of players, but are acts deemed reasonable both for the avoidance of personal ridicule<sup>587</sup> and the establishment of a hard-working reputation.

This points to a particular characteristic of modern sport as a form of labour where, as Loïc Wacquant has suggested, sport 'looks like a cross among prostitution, the performing arts, soldiering, and bartering.'<sup>588</sup> Attitudes towards pain among players and spectators of heavy-contact sports provide a useful example. Aside from the insistence that injured players 'man up' (or the reverse scenario examined earlier where players are emasculated for failing to do so), a class frame is often employed to portray

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<sup>586</sup> Bourdieu identifies a number of these 'agents engaged in the struggle over the definition of sporting uses of the body,' including clergy, doctors, health specialists, and 'educators in the broadest sense (marriage guidance counsellors, etc.), pacemakers in matters of fashion and taste (couturiers etc.)' (n 585), 826-827.

<sup>587</sup> See the comments made by players interviewed in a 2006 study conducted by Martin Roderick who relay the measures undertaken by many professional footballers to hide injuries and the degree of pain they caused from teammates and coaching staff so as to avoid the reputation of being a poor player: M. Roderick, 'Adding insult to injury: workplace injury in English professional football' (2006) 28(1) *Sociology of Health & Illness* 76.

<sup>588</sup> L. Wacquant, 'A fleshpeddler at work: Power, pain, and profit in the prizefighting economy' (1998) 27 *Theory & Society* 1, 2.

players who do ‘play through the pain’ as more hard-working and thus, valuable. Kristi Allain’s work has noted the use of the term ‘lunch pail’ players in ice hockey leagues<sup>589</sup> to refer to players who ‘[l]ike their working-class equivalents... are thought to do “dirty” and unglamorous jobs on the ice’ and are understood to be ‘less about beauty, and more about grit.’<sup>590</sup> While this work rhetoric is prominent in a number of sports contexts, it is most prevalent in professional leagues where athleticism is often assessed on the basis of occupational achievements, themselves often signified by risk-taking, violence, and injury. Nick Trujillo, in his study of American baseball, identifies a number of factors which contribute to the understanding of sport-as-work, including the differentiation of sport from play<sup>591</sup> and the commodification of players, where they are ‘sold’ or ‘traded’ in a competitive marketplace.

Understanding the professional sporting world as a marketplace is not an imaginative exercise, particularly when the high-end salaries and ancillary benefits of pro athletes are considered. The introduction of in-game violence, however, alters the standard view of sport-as-work. In a recent book detailing his career as an NHL enforcer, Georges Laraque writes about the stresses and difficulties of being ‘paid to fight’:

[Most] tough guy[s] in the league would rather do anything but fight on the ice. They would love to score tons of goals, become more and more talented, and earn bigger salaries, all the things hockey players dream of the moment they become hockey players. And I was one of those. I never enjoyed fighting. I did it because it was my job and the only way for me to keep playing in the NHL.

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<sup>589</sup> Allain (n 557), 14.

<sup>590</sup> B. Arthur, ‘Case of beauty and the beast; Crosby plays, but Ovechkin is a performer’ *National Post* 11 May 2009, S1.

<sup>591</sup> N. Trujillo, ‘Hegemonic Masculinity on the Mound: Media Representations of Nolan Ryan and American Sports Culture’ (1991) 8 *Critical Studies in Mass Communication* 290. Trujillo cites the work of W.A. Sadler who observed how athletes themselves view their sports activities as labour, including the characterisation of practice sessions as ‘work outs’; W.A. Sadler, ‘Competition out of bounds: Sport in American Life’ in A. Yiannakis et. al. (eds) *Sport Sociology: Contemporary Themes* (Kendall/Hunt 1976).

Period... I could be injured, hurting everywhere — it didn't matter. If I had to go, I simply had to.<sup>592</sup>

Similar accounts have been given by other game enforcers, each noting the stress and anxiety associated with their 'jobs' as in-game fighters.<sup>593</sup> In some instances, a player's refusal to engage in violent conduct results in the end of his or her professional sporting career.<sup>594</sup> This has led many to comment on the exploitive nature of sport, described by Wacquant as 'show business with blood',<sup>595</sup> a factor further complicated when the distinctive class locations of many contact sports players are considered. Boxers, for instance, have been noted as largely coming from 'poor, working-class backgrounds. Many are members of minority groups for whom boxing may seem to be one of the few ways out of the misery they were born into.'<sup>596</sup> The use of a class analysis allows for a view of the differential 'stakes' at risk in sport violence where subproletarian players, 'shorn of all social and economic security, subjected to the cycles of employment in unskilled and unstable labour' are frequently forced into less rationalized management of body capital in pursuit of socio-economic betterment.<sup>597</sup> As the boxing club manager

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<sup>592</sup> G. Laraque and P. Thibeault. *Georges Laraque: The Story of the NHL's Unlikeliest Tough Guy*. (Viking Canada 2011), 151-2.

<sup>593</sup> Although enforcers are most commonly found in ice hockey leagues, other sports also employ their use, including basketball and American football; see: J. Citron and M. Ableman. 'Civil Liability in the Arena of Professional Sports' (2003) 36(2) UBCL Rev. 193; and A. Clarke, 'Law and Order on the Courts: The Application of Criminal Liability for Intentional Fouls during Sporting Events' (2000) 32 Ariz. St. L.J. 1149.

<sup>594</sup> The case of professional ice hockey player, Paul Mulvey, is one of the more famous instances of this occurring. During a 1982 game when Mulvey was playing for the Los Angeles Kings, a fight broke out on the ice. Mulvey was on the bench at the time and was ordered out onto the ice by his coach, Don Perry, with the directive to fight. Mulvey (who had just returned to active play following a recent suspension), refused. His coach accused him of being a coward and unwilling to defend his teammates and allegedly threatened that Mulvey would never play professional hockey again. The threat would prove true: Mulvey was benched for the remainder of the game, demoted to the minor leagues, and never played for the NHL again; see: Clarke (n 593), 1160.

<sup>595</sup> L. Wacquant, 'Whores, Slaves, and Stallions: Languages of Exploitation and Accommodation among Boxers' (2001) 7(2-3) *Body & Society* 181.

<sup>596</sup> Messner and Sabo (n 535), 77. Colin Radford also notes that boxing has largely been perceived by participants as an 'escape from hard labor – or, as it is more likely to be these days, unemployment'; C. Radford, 'Utilitarianism and the Noble Art' (1988) 63 *Philosophy* 63, 70.

<sup>597</sup> Wacquant, *Body & Soul: Notebooks of an apprentice boxer* (OUP 2004), 131. Wacquant makes reference to the case of Mike Tyson, suggesting 'it would be difficult to overstate the influence of the Tyson phenomenon on boxing in the black ghetto in the late 1980s' (43, n. 31) as an example of the class

of Wacquant's study points out to him, 'if you want to know who's at d'bottom of society, all you gotta do is look at who's boxin.'<sup>598</sup>

Within this context of labour exploitation, how is the 'freedom to consent' meant to be understood? The law's interventions into the sporting realm are rare and hinge on determinations of whether the harm incurred exceeded what public policy or 'good reason' will allow players to consent to. Despite the psychological burdens and the dangers associated with violent confrontation (often when players have pre-existing injuries), normal protections by way of work safety standards or even legal sanctions are not applicable to the sports context unless the conduct can be deemed to fall outside the reasonable expectations of play. Coupled with the criminal law's use of the 'public interest' as a delimiter of consent, the effect is to construct certain forms of violence as 'reasonable.' This establishes not just what is acceptable (and valuable) on the playing field, but also within the surrounding social order itself. In some of the more contact-oriented sports, (such as rugby, ice hockey, or American football), 'the borders between the permissible and the inadmissible are not always very clear-cut. Both are inherently violent.'<sup>599</sup> This distinction is even more difficult when the unwritten codes of players are considered. Some have suggested unsanctioned violence is best defined alongside a notion of 'fair play,' where something 'that is not supposed to come to light, to be exposed, because it is not directed to the unfolding of the game but to the private goals of rage or revenge, to "get at" a specific opponent, to "prove" oneself.'<sup>600</sup> However, most players' accounts of unwritten codes and their own expectations of in-game

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(and racial) frame in which boxing (and their clubs) exist. Bourdieu (n 585) has also commented on how sporting careers are often the sole means of upward mobility for the working classes.

<sup>598</sup> Wacquant (n 597), 42.

<sup>599</sup> A. Brink, 'Dirty old habits die hard' *Guardian* (24 June 1995), 29; as cited in John H. Kerr, *Rethinking Aggression in Sport* (Routledge 2005), 66.

<sup>600</sup> Brink (n 599), 29.

violence don't adhere to this classification, particularly when the ideals of hegemonic masculinity are considered. As one commentator observed with respect to the unwritten code in rugby: 'you do not allow yourself or your team-mates to be publicly brutalized by an opposing team in the course of play. You are duty bound to level the score.'<sup>601</sup> This accords with ice-hockey players' (and fans') accounts of fist-fighting as 'part of the game' of hockey and the goals of intimidation and retaliation which many contact-sports players report as inciting (and justifying) in-game violence.<sup>602</sup> Further, these characterizations of violence in sport as merely 'part of the game' are not made by spectators or players alone, but have also formed part of judicial determinations of criminal liability. As was noted by the British Columbia Provincial Court in its sentencing of Todd Bertuzzi (a professional ice hockey player) for his assault against an opposing player:

I am not so naïve as to suggest that fights are not a part of hockey. I will leave aside the issue of whether they should be, but the fact of the matter is that hockey is a sport in which there is significant physical contact, and in certain circumstances fighting is considered to be part of the game. It is not a sanctioned part of the game, but it is a part of the game.<sup>603</sup>

Where physical violence does garner criticism in sports circles, it is rarely because the violence has reached an unprecedented level but rather because it was for the wrong ends. In other words, it is where players have misused their body capital. Loïc Wacquant has observed the practice of 'managing' body capital that is prevalent among both amateur and professional boxers where the French expression '*payer de sa personne*' is an apt description of a pugilist's ethic.<sup>604</sup> He notes how successful careers are dependent on 'a rigorous management of the body, a meticulous maintenance of

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<sup>601</sup> Kerr, (n 599), 67.

<sup>602</sup> Kerr, (n 599).

<sup>603</sup> *R. v. Bertuzzi* (n 448), [35]. It's also worth noting that the same court (albeit four years earlier) made mention of the accused's motives of regaining team pride as justification for an in-game fight which resulted in a conviction for aggravated assault with a weapon; *R. v. McSorley* (n 28).

<sup>604</sup> Wacquant, (n 597).



each one of its parts... an extraordinarily efficient relation to the specific capital constituted of one's physical resources.'<sup>605</sup> Further, the use or misuse of one's body capital also serves as the foundation for critiques among players about the reasonableness of in-game violence. Wacquant cites an example of a boxer in his study, Curtis, who was criticized by his peers for going too many rounds with a rather vicious opponent. 'Curtis ain't gonna go too far if he lets himself get beat up by guys like that, if he don't know how to *economize himself* better than that. It's a long road,' one of the other boxers confides in Wacquant, drawing attention to the capitalist model that not only instructs determinations of reasonable or rational physical violence but is supported by them.<sup>606</sup> Against this backdrop, players' decisions to engage in violence (which would otherwise be illegal) so as to maintain employment, intimidate an opposing team, garner revenge for past losses or attacks on key players, or simply to assert personal pride are rational, for 'good reason,' and not sufficiently harmful to trigger the criminal law. Instead, they are examples of a player's estimable work ethic and occupational ambition.<sup>607</sup>

This is recognized in contemporary judicial treatments of the defence of consent alongside a recognition of the 'nature' of sport and its participants. In keeping with idealized notions of masculinity, court decisions on the applicability of the consent defence in cases where bodily harm has been incurred during sporting activity often include commentary on the inherent competitiveness of sport and the 'naturalness' with which it heightens aggression, risk-taking behaviour, and the 'passions' of its

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<sup>605</sup> Wacquant (n 597), 127.

<sup>606</sup> Wacquant, (n 597), 146.

<sup>607</sup> In many instances, these acts of physical aggression are further rationalized on the basis that such confrontations are 'natural' for men, thus further cementing violence and risk as components of an idealized masculinity; see: L. Fitzclarence and C. Hickey, 'Learning to rationalize abusive behaviour through football' in R. Matthews, et. al. (eds) *Where the Boys are: Masculinity, Sport, and Education* (Deakin University Press 1998).

participants. Where in-game violence can be linked to these qualities, the defence of consent is often permitted, irrespective of the degree of injury or level of violence employed. Take, for instance, a recent decision of a Canadian provincial court where the accused faced charges of assault causing bodily harm after having kicked the complainant repeatedly in the face (while wearing cleats) during an amateur soccer game.<sup>608</sup> The complainant suffered serious injuries, including severe facial lacerations and long-term breathing difficulties. In dismissing the charge and allowing the defence of consent, the trial judge relied on assumptions about how participants in such a ‘competitive setting’ could easily be caught up in ‘the heat of the match.’<sup>609</sup> These characteristics were deemed central components to the (amateur) game’s ‘playing culture.’ Thus, despite a finding that the accused had used ‘reckless force,’ it was determined to be in service to ‘a legitimate sporting interest in both players striving to gain control of the ball; one to score, the other to defend.’<sup>610</sup> The judge in allowing the defence of consent makes note of the accused’s lack of intent; however, this can only be understood within the context of the playing culture the judge establishes – one that valorizes risk and injury in pursuit of victory:

Struggle for control of the ball is part of the essence of soccer, particularly close to a goal. In such a competitive setting as was the match here, it cannot be said that players do not consent to the high risk of injury and the potential of receiving reckless force from an opponent in such a struggle for a loose ball in the penalty area proximate to one side’s goal. [The accused] was quite within his rights under the playing culture of soccer to pursue his scoring chance...<sup>611</sup>

Where, however, harm is incurred in circumstances that either challenge these ‘legitimate’ uses of bodily capital or don’t support them, consent is rarely permitted.

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<sup>608</sup> *R. v. Adamiec* [2013] M.J. No. 325.

<sup>609</sup> *Adamiec* (n 608), [5].

<sup>610</sup> *Adamiec* (n 608), [48].

<sup>611</sup> *Adamiec* (n 608), [51]. A similar finding was reached in the *R. v. Green* and *R. v. Maki* cases on the basis that the assault took place while both players were both trying to gain possession of the puck.

One common instance of this is found in cases where the violence occurs after play has stopped or where victory is deemed unlikely.<sup>612</sup>

Although these cases speak to the contemporary context, the interpretation of ‘harm’ as linked to bodily capital has long-standing roots in the common law treatment of the defence of consent to bodily harm. As early as 1604, the defence of consent was limited to acts that would not deny the king of the corporeal use of his subjects and their limbs.<sup>613</sup> This limitation was explicitly linked to the criminal law’s consideration of the ‘public interest’ in the 1882 English case, *R. v. Coney*, where in denying the defence of consent to participants of a prize fight, Hawkins J noted:

it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution. In other words, though a man may by his consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public for the maintenance of good order. He may compromise his own civil rights, but he cannot compromise the public interests.<sup>614</sup>

In this instance, the social utility of sport hinges on the perceived dangers it might foster among its participants and its spectators. One of the earliest judicial delineations of the social utility of sport eliminates activities undertaken solely for profit for exactly this reason. In a 1763 English text, Sir Michael Foster distinguishes between ‘cudgelling or wrestling’ and ‘prize-fighting and public boxing matches or any other exertions... of the like kind which are exhibited for lucre’ on the basis that the latter ‘serve no valuable

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<sup>612</sup> See, for instance, *R. v. Gray* [1981] 5 WWR 654, where the defence of consent was prohibited on the grounds that the accused had acted after the whistle had blown. A similar scenario took place in the American case of *State v. Floyd*, 466 NW 2d 919 (Iowa Ct. App. 1990).

<sup>613</sup> *Wrights Case* (n 525).

<sup>614</sup> *Coney* (n 473), 553.

purpose' but rather encouraged 'a spirit of idleness and debauchery.'<sup>615</sup> Although the criminal law's approach to sport-for-profit has changed dramatically, these early cases demonstrate a long-standing preoccupation with the misuse of bodily capital within judicial determinations of consent and its limits.

Bourdieu has argued that one's relation to one's body marks a particular class *habitus* or set of attitudes and values, where the use of body capital is the mark of the disenfranchised not simply because of a lack of other available resources (as in Wacquant's subproletarian pugilists) but also because of the ethos that such corporeal use represents. Bourdieu notes

weight-lifting, which is supposed to develop the muscles, was for many years, especially in France, the favourite working-class sport; nor is it an accident that the Olympic authorities took so long to grant official recognition to weightlifting, which, in the eyes of the aristocratic founders of modern sport, symbolized mere strength, brutality and intellectual poverty, in short the working classes.<sup>616</sup>

This suggests that the legal regulation of sport serves a disciplinary function, influencing how the body of the 'lunch pail' athlete is shaped and valued and, in turn, how the rules and parametres of sporting practice, including its violence, will be set and enforced. This suggests not only a differential valuation of bodies within sport according to the supply they can offer a politicized social demand, but also hints at the ethos produced through this process. Michael Robidoux provides some insight on this in his study of sporting activities during the British settlement period in Canada, noting that

[t]he intent of making sport and physical activity more socially democratic was threefold: to acquire levels of control over increased amounts of leisure time

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<sup>615</sup> Foster, (n 470), 260; as cited in Binder (n 525), 239. Binder elaborates on the exclusion of prize-fighting, suggesting it was the heightened possibility that such events would result in a breach of the peace that drove the sense of the activity's social disutility.

<sup>616</sup> Bourdieu (585), 836.

made possible by industrialization and a shorter workweek; to reduce class conflict by enabling male participants of various backgrounds to compete on an equal playing field; and to build a physically fit yet subordinate workforce, ensuring maximum levels of industrial production.<sup>617</sup>

Sport can thus be understood to serve as a site for the negotiation of hegemony. In a recent study of early North American sporting events, Kenneth Cohen explores how the public spaces of athletic events in frontier America created opportunities for socialisation across class lines but argues against the view that sport merely mirrored already existent class relations. Instead, the sporting events staged in public taverns, fields, and raceways of the newly independent United States created a shared culture (of risk) which served to entrench capitalist ideology.

In posh ‘refined’ sporting spaces, the old tenets of gentility – which privileged mental skill over physical force, heterosocial accord over homosocial discord, and urged an etiquette based on self-control to enforce these priorities – were reaffirmed and men of all ranks abided by strictures of politeness. In coarse ‘physical’ spaces, however, confrontations frequently degenerated into fistfights instead of arguments. Each type of space served particular purposes in a risk culture linking sport to business, as men sought to establish both their reputation and their raw manliness in the throes of a boom-and-bust economy riddled with rampant failure and decreasing opportunities for advancement. Since failure, stagnation, and hardening class lines threatened men’s reputations and their very masculinity, ‘various classes of persons’ resorted to the two types of sporting environments to recuperate both.<sup>618</sup>

Cohen’s study takes note of how sport was initially employed by the bourgeoisie of early America with the intention of fostering deference among the lower classes, i.e. a sense of respect and reverence for the social and cultural authority of the business élite. Many of the sporting events were supported as a show of philanthropy and investors created ‘genteel’ spaces from which to consume the coarseness of physical sport (rather

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<sup>617</sup> M.A. Robidoux, ‘Imagining a Canadian Identity through Sport: A historical interpretation of lacrosse and hockey’ (2002) 115(456) *Journal of American Folklore* 209, 212.

<sup>618</sup> K. Cohen, ‘*To Give Good Sport*’: *The economic culture of public sporting events in early America, 1750-1850* (PhD Dissertation, University of Delaware 2008), 9.

than participate in it).<sup>619</sup> Predictably, this fostered enmity among the excluded, effectively shifting investor aims of deference to economic and political return. Cohen observes that in this way, sport served as the site where a capitalist ideology could take root, 'heightening the contest for status that lured people to participate even as the expense and bureaucracy needed to stage these activities hardened the power and control of wealthy Americans.'<sup>620</sup>

This demonstrates a use of sport to 'condition the savage body' while using the defence of consent to entrench the ideologies that such social divisions could be justified upon. Where individuals act in pursuit of idealized masculinity and profit, their acts of aggression, risk, and violence are intelligible. Where, however, individuals act in ways that challenge these values, these behaviours lack the 'good reason' that enables recognizable consent. Much like the requirements in Ancient Greece that one conform to the requirements of citizenship before one's consent could be intelligible (and juridically recognizable), contemporary treatments of consent are accompanied by normative preconditions which appear to be in service to the state. Hegemonic masculinity demands a commodification of the body, put to use for the pursuit of profit. Provided these ideals are what has motivated a player's choice to incur bodily harm, the violence will be deemed to have sufficient social utility to enable the defence of consent. Where, however, the harm incurred has not been in accordance with these masculine ideals or the bodily harm suffered was incurred as a result of foolhardiness, the errors of this 'mismanaged' self are the player's to bear. In this way, consent can be seen to operate in a manner similar to its functions in the historical periods examined in

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<sup>619</sup> This distinction between consumption and participation of/in sport is one made by Bourdieu (n 585) when noting the commodification of sport-as-spectacle.

<sup>620</sup> Cohen (n, 618), 686. Bourdieu has argued that 'in sport as in music, extension of the public beyond the circle of amateurs helps to reinforce the reign of the pure professionals' (n 586), 829.

previous chapters in that it demands conformity to certain prescribed subjectivities in order to be intelligible. Yet, in the contemporary context, there is an additional capitalist logic which operates through the ‘public utility’ exemption to the consent defence. Poor decision-making, miscalculated risk, and a mismanagement of body capital are an individual’s error in judgment and the consequences fall not to the state to remedy, but within the realm of individual responsibility. As Fiske has observed with respect to televised portrayals of masculinity, the conception of ideal maleness as ceaseless labour, boundless achievement, and propensity for risk creates a ‘superhuman’ archetype, its own inaccessibility necessary ‘to keep men striving for more and more achievement in order to maintain the ‘naturalness’ of the ideological concept of progress which is so central to capitalism.’<sup>621</sup>

This quality of ‘inaccessibility’ echoes the fictional role consent is understood to have in liberal accounts of state legitimacy, as examined in Chapter One. The consent-as-autonomy story is premised on the presumption that each person has the right to self-govern, to act in the world as one wishes. Yet this freedom is limited by a prohibition against harming others, the nature of which is informed by unwritten codes of practice and cultural norms of intelligibility. Autonomous action must conform to these codes and norms to not simply be allowed but to be recognizable as autonomy. One must *be* a certain kind of person and *act* in a certain kind of way to be free. Contemporary treatments of consent, in this way, are not unlike the acts of submission seen in the medieval medical context, where despite an understanding of the promise consent makes (of autonomy or of union with the Divine) being understood as intangible and, in many circumstances, unrealisable, it is pursued nonetheless. In fact, if the observations

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<sup>621</sup> J. Fiske, *Television culture* (Methuen 1987), 210

made by Fiske (above) are to be accepted, it is this unrealisability that prompts the pursuit, while concealing its ideological imperatives.

### Conclusion

This chapter's examination of how the criminal law approaches charges of bodily harm incurred during sporting activity demonstrates how the defence of consent is used to produce and entrench a code of conduct for players which makes it both rational and laudable to subject oneself to violence, provided it bolsters cultural, social, and economic capital. This marks a preservation of not only a (privileged) hegemonic masculinity but one in service to capitalism. Sports, constructed as a marketplace, is not simply a domain of jurisdiction within which law might act, but it is also a site for the formation of truth, where a set of rules and attitudes are established that grant adjudicative authority to law to assess what is 'harm' and what is simply 'fair play' in ways that support class division and corporeal commodification. Wacquant has suggested that many of the hardships now facing the United States, including the collapse of the housing market, increased costs in food and oil, and unprecedented rates of unemployment don't reveal what some have termed the 'ownership society,' but rather demonstrate neoliberalism's success in instituting a normative principle that moralizes the punishment of those who haven't amassed sufficient 'human capital.'<sup>622</sup> The criminal law's interventions in regulating (or ignoring) violence in sporting arenas demonstrates how consent acts as a key component in the construction of this 'human capital.' In the sports context, consent is denied to those players who haven't learned how to 'man up' or 'play through the pain,' or those who have expended their body

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<sup>622</sup> L. Wacquant, 'Three steps to a historical anthropology of actually existing neoliberalism' (2012) 20 *Social Anthropology* 66. See also Wacquant's 2007 text, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke Univ. Press 2007).



capital in ways that either don't contribute to these hegemonic ideals or reveal disjointedness in the rationality of the market or the natural equality of economic man.

Are these the new conditions of possibility for consent as it operates today? How should the consent-as-autonomy story be understood within the contemporary context? How does its promise of 'freedom' operate within a capitalist logic? The following chapter explores these inquiries through a more in-depth examination of neoliberal rationality and its influence on the current operations of consent.

## CHAPTER FIVE – THE POLITICAL ECONOMY OF CONSENT

### Introduction

The previous chapters have focused on three of the subject areas where law contends with the notion of consent, namely the regulation of sex, the requirements for lawful medical treatment, and defences to assault. In each instance, consent appears to perform a wide variety of functions that differ from the dominant story of consent-as-autonomy. Whether a guardian of proprietary and patrilineal interests, a path to spiritual enlightenment through submission to the Other, or an enactment of hegemonic masculinity, these forms of consent do not appear to produce, facilitate, or enact personal freedom so much as they represent acts of submission to conformist subjectivities. Yet the understanding of consent as an attestation of autonomy prevails. Amidst the evidence unearthed in previous chapters of these alternative understandings and functions of consent, it seems important to determine how this autonomy story of consent has become both dominant and obscuring of all other narratives. Further, what purpose does this obfuscation serve?

In an effort to address this central inquiry, this chapter is organized in three parts. It begins with a brief exploration of the current logic within which consent operates today: neoliberalism. This portion of the chapter is meant to position neoliberalism as more than a theory of economic activity and instead a form of political and legal rationality. Foucault's concept of governmentality might be thought of as the engine that drives an analysis of this kind, where an understanding of how power operates to both produce and delimit intelligible personhood necessitates an examination of the political

rationalities that support these conformist subjectivities.<sup>623</sup> As such, a component of the first section of this chapter includes an overview of Foucault's own observations on neoliberalism and the market as a site of truth, moving to a fuller examination of what freedom (and autonomy as 'self-governance') might mean within this regime. As part of this analysis, neoliberal rationality is positioned as a foundationalist discourse, where the ahistorical story of capitalism is explored for the contribution it makes to securing market rationality as 'common sense' in the modern era and the implications this has for the role which consent is allotted in contemporary law.

The second section of the chapter seeks to test the prevalence of this neoliberal rationality within contemporary deployments of consent in each of the two legal areas examined historically in previous chapters, namely: consent to sex, and informed consent to medical treatment (although some reference to the sports context is also included). This section explores two of the central components of neoliberal rationality as they operate through consent in these legal areas, namely: individualism and responsibilisation. As part of this discussion, the law's deployment of arguments of social utility and risk are examined for their own contributions to maintaining neoliberal understandings of the self. The chapter concludes with a discussion of the implications of a legal doctrine of consent that is entrenched and enacted within a capitalist logic, paying particular attention to its consequences for subjectivity, where self-governance and risk management become the centrepieces of the consenting (neoliberal) subject. The chapter is thus concerned with the politics of consent and how they operate to not only naturalize particular (economic) rationalities and ontologies but to also produce the

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<sup>623</sup> Wendy Brown, in her own analysis of contemporary neoliberalism, cites Foucault as the source for the view that neoliberalism is better understood as a 'political rationality' than a 'bundle of economic policies with inadvertent political and social consequences': *Edgework: Critical Essays on Knowledge and Politics*. (Princeton University Press 2005), 38.

subjects needed to enact them. In this respect, it is engaged in the political economy of consent.

### Neoliberal Rationality: Touched by an Invisible Hand

In order for a narrative to secure its place as a foundationalist discourse, it must do more than simply out-voice other accounts. It must secure itself as truth. As Foucault suggested in his own exploration of the rise of neoliberalism in his lectures at the Collège de France in 1979, part of the success story of neoliberalism is its ability to naturalize the very social conditions it requires to survive. Thomas Lemke furthers this point when he suggests that neoliberalism is ‘a political project that endeavors to create a social reality that it suggests already exists.’<sup>624</sup> There are arguably two components to such an endeavour. The first is the task of obscuring the social and political events, processes, and customs which made it possible for a different way of acting and being in the world to develop. These are what can be thought of as the ‘conditions of existence’ for neoliberalism. In the case of the consent-as-autonomy story, this has meant positioning the underlying components of classical liberalism (i.e. self-interest, self-regulation, possessive individualism) as both ‘natural’ (in terms of what human beings inherently want or do) and ahistorical, i.e. as coming into existence merely as a result of the development or evolution of these natural human tendencies.

A second – and related – component to the establishment of a foundationalist discourse is the creation of a (necessarily) fictitious subject for whom these tendencies *are* natural and thus, ‘rational.’<sup>625</sup> This not only creates a pre-social and ahistorical ontology (which itself serves to obscure alternate subjectivities) but it also provides justification for the

<sup>624</sup> T. Lemke, ‘Foucault, Governmentality, and Critique’ (2002) 14(3) *Rethinking Marxism* 49, 60.

<sup>625</sup> The medieval fiction of the ‘constant man’ as well as contemporary law’s use of the ‘reasonable person’ are good examples of this ahistorical and pre-social subject put to regulatory use in this fashion.

norms of intelligibility that establish the ‘normal rules of play’ among citizens of the order. Thus, certain constraints on what a person may do (or be) within a neoliberal world are not only deemed rational on the basis that such actions or desires are not what ‘normal’ people ‘naturally’ want to do, they are also removed from the realm of what is desirable in the first instance. It should therefore hardly be necessary to force populations to abide by ‘the rules’ given that they merely represent what ‘everyone knows everyone wants.’<sup>626</sup>

Neoliberalism – as both a set of economic policies and their underlying political rationality – fulfils each of these two components of a foundationalist discourse. In the first instance, it benefits from the ahistorical story of capitalism told by classical economic liberalism which has ‘naturalized’ the neoliberal subject. This, in turn, has served to imbue the principles of self-interest, wealth maximization, possessive individualism, and competition with a ubiquitous truth, allowing for prescriptions about what human beings are (and should be) that are then used to delimit the boundaries of acceptable desires, wills, and actions. The previous chapter’s examination of the defence of consent within the contemporary sporting context provides some evidence of this, demonstrating how modern day uses of consent function within a logic where it is rational to subject oneself to violence – provided it bolsters cultural, social, and economic capital. This lends credence to Wendy Brown’s claim that in the contemporary sphere of existence, ‘not only is the human being configured exhaustively as *homo economicus*, but all dimensions of human life are cast in terms of a market rationality.’<sup>627</sup>

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<sup>626</sup> As Lori Beaman has remarked in her study of Canadian courts’ treatment of religious objections to medical treatment, “‘Everybody knows that’ is a difficult position to counter,” (n 64), 95.

<sup>627</sup> Brown (n 623), 40.

Yet, neoliberalism is not the only foundationalist discourse at work in the law's treatment of consent. As delineated in Chapter One, the autonomy narrative that is so closely associated with consent is also positioned as ahistorical and 'natural' – both in terms of what human beings might want and in terms of what constitutes 'normal' personhood. Further, the ways in which these two foundationalist discourses work in tandem are rarely investigated. Instead, the conditions of existence for the consent-as-autonomy narrative are obscured, leaving its liberal origins (and its role within the ideology of capitalism) unexplored. It should then not be surprising that consent is itself cast in proprietary terms, where autonomy is often described as a form of 'self-ownership.' What, then, becomes of exercises of freedom when envisioned as dispositions of commodities? Who, in contemporary legal treatments of consent, is entitled to 'self-own'? What does autonomy mean in a neoliberal world? To address these inquiries, some preliminary work needs to be done to disrupt the ahistorical status of the consent-as-autonomy narrative. This will necessitate a brief investigation into the emergence of classical liberalism, its impact on the practices of the medieval market, and the conditions of existence for capitalist thought. The following sections attempt to chart this course.

*The market rationality: An origin-less story*

Best evidenced by the cardinal principle of *laissez-faire*, classical liberalism conceptualizes freedom in opposition to constraint, (i.e. freedom *from* as opposed to freedom *to*). Within this frame, the capitalist state is understood as merely the 'natural' consequence of removing barriers to free action, effectively leaving markets (and their actors) 'free' to develop as they might be naturally inclined to do. As Ellen Meiksins Wood has observed, in 'most accounts of capitalism and its origins, there really *is* no

origin.’<sup>628</sup> Instead, capitalism is presented as inevitable, omnipresent, or simply lying dormant in wait for its release from any variety of restrictive conditions.<sup>629</sup> This is certainly the argument underlying one of the more common explanations for the rise of capitalism: the end of feudalism. In such formulations, capitalism is positioned as merely ‘an acceleration of universal and transhistorical, almost *natural*, tendencies’ where ‘industrialization is the inevitable outcome of humanity’s most basic inclinations.’<sup>630</sup>

An endemic theory of neoliberalism (i.e. as an inevitable development of the basic human characteristics of greed and need) would thus seem to owe something to the origin-less story told about capitalism.<sup>631</sup> This claim to an inherent or intuitive nature is further cemented by a fairly opaque view of neoliberalism’s own genesis – something that some commentators have suggested is facilitated by the name ‘neoliberalism’ itself. ‘[F]ree trade and “competitive advantage” is 200 years old,’ Paul Treanor argues. ‘There is nothing “neo” in [this] liberalism.’<sup>632</sup> And yet, other scholars warn against adopting the view that neoliberalism is merely an extended, saturated form of capitalism

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<sup>628</sup> Wood, (n 403), 4.

<sup>629</sup> Wood notes a series of ‘chains’ that capitalism is often characterized as having been ‘released’ from, including feudalism and ‘the parasitic powers of lordship, or the restrictions of an autocratic state. Sometimes they are cultural or ideological: perhaps the wrong religion’ (n 403), 4. See, in particular, Chapter 1 of her 2002 text for further discussion of the dominant explanations for capitalism’s development, including the commercialisation model (where capitalism is the natural outcome of human practices), the demographic model (where capitalism is the result of the laws of supply and demand), and the world systems theory (where capitalism is explained through increased globalisation and incremental ‘value-added’ processes, such as various technological advancements). While Wood is careful not to completely dismiss any of these explanations, she does point to each model’s reliance on an ahistorical notion of capitalism which ignores the necessary changes in social relations which precede these other developments.

<sup>630</sup> Wood (n 403), 5.

<sup>631</sup> Many scholars have laboured to track the origins of neoliberalism in more specific detail than is needed here. See, in particular, David Harvey’s 2007 text, *A Brief History of Neoliberalism*, where he suggests the ‘neoliberal turn’ in global politics was a response to ‘the catastrophic conditions that had so threatened the capitalist order in the great slump of the 1930s’: (OUP 2007), 9.

<sup>632</sup> P. Treanor, ‘Neoliberalism: origins, theory, definition.’ (Research Paper, Personal Blog) <<http://web.inter.nl.net/users/Paul.Treanor/neoliberalism.html>> accessed: 14 December 2013.

or the natural evolution of an ever-expanding practice of rationalization.<sup>633</sup> Such views tend to overlook the very direct forms of intervention governments make to further the neoliberal agenda, obscuring the intricate relationship between the market and the state. Wendy Brown, for instance, notes that despite the contributions Marx's theory of capital and Weber's rationalization thesis make to contemporary understandings of neoliberalism, 'neither brings into view the historical-institutional rupture it signifies, the form of governmentality it replaces and the form it inaugurates, and hence the modalities of resistance it renders outmoded.'<sup>634</sup>

Brown's analysis directs attention to the all-encompassing quality of neoliberal rationality, its presence in every aspect of contemporary human existence, while highlighting how this permeation relies on an underestimation of it as a 'constructivist project.'<sup>635</sup> Thus, while the neoliberal project envisions and assesses all components of human behaviour and subjectivity within the confines of a market rationality, it doesn't leave these factors to chance, nor does it place faith in the 'invisible hand' of the classical liberal model. Rather, the 'hand' of neoliberalism is an active agent, intervening in social policy, legal reforms, and countless initiatives at the domestic and international levels. The state itself must behave as a market; its policies and initiatives must be defensible as cost-wise and economically productive. Neoliberalism is both the directive for the state to act in the interests of the market and the underlying logic which grants such initiatives legitimacy.<sup>636</sup> Further, neoliberalism is also actively involved in

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<sup>633</sup> It may be useful to note that Foucault distinguishes between classical liberalism and its 'neo' counterpart on the basis that the first envisioned a socio-political realm based on the human activity of *exchange*, whereas he viewed neoliberalism as focused more on *competition*. For a more in-depth discussion of this distinction, see: J. Read, 'A Genealogy of Homo-Economicus: Neoliberalism and the Production of Subjectivity' (2009) 6 *Foucault Studies* 25.

<sup>634</sup> Brown (n 623), 45.

<sup>635</sup> Brown (n 623), 40.

<sup>636</sup> Foucault notes this as a form of sovereignty founded on economic activity rather than divine authority, historical conquest, or paternal benevolence – foundations that were relied on in historical understandings



the ‘dissemination of social norms designed to facilitate competition, free trade, and rational economic action on the part of every member and institution of society.’<sup>637</sup> It is in this way that the neoliberal ‘hand’ is not as readily visible as its level of involvement in contemporary human existence might suggest it should be, effectively obscuring its conditions of possibility.

*The neoliberal subject: A normative ontology*

These norm-setting practices of neoliberalism are a significant means by which neoliberal rationality establishes itself as a foundationalist discourse. As David Harvey has argued, to gain dominance, an ideology or ‘way of thought’ must embed its ‘conceptual apparatus’ into the common sense, thus removing it from scrutiny or resistance. This apparatus must contain valorised ideals, those that ‘appeal to our intuitions and instincts, to our values and desires’ and Harvey contends that neoliberalism’s selection of individual freedom and human dignity was a wise one, given their ‘compelling and seductive’ character.<sup>638</sup> Yet, if neoliberalism is a new dog, this is an old trick. The ability to obscure its conditions of existence through the dissemination of legitimizing norms has been a key component to capitalism’s widespread survival given the inherent contradictions within the system itself.<sup>639</sup> The

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of consent seen in previous chapters. See, for instance, his discussion of *raison d’Etat* in the Jan 10, 1979 lecture (translation published in 2008). Wendy Brown observes how this economically based notion of legitimacy manifests itself even in challenges to state action where anti-war protests in the United States were debated on the grounds that they were ‘expensive disruptions,’ creating ‘unacceptable costs for financially strapped cities.’ She suggests this demonstrates how within a neoliberal rationality, ‘the value of public opinion and protest should be measured against its dollar costs’ (n 623), 51. For Brown, this represents a conjoining of the interests of neoliberalism and imperialism – a relationship that is facilitated by a market rationality of ‘efficiency.’

<sup>637</sup> Brown (n 623), 41.

<sup>638</sup> Harvey (n 631), 5.

<sup>639</sup> This hints at what Wood identifies as capitalism’s ‘paradox of freedom,’ where despite heralding ‘choice’ as the preeminent principle of a market economy (where freedom is thought to be perfected in the supply/demand aspects of commercialism), the origin-less story of capitalism and its ensuing logic of inevitability negates, from the onset, any notion of ‘choice,’ (n 403). Wendy Brown has made a similar argument with respect to the paradoxes that liberalism (and its prioritizing of rights) creates, see: W. Brown ‘Suffering Rights as Paradoxes’ (2000) 7(2) *Constellations* 230.

expansion and prosperity of capital does not benefit the many but rather the few – and even then it is on the basis of exploitation. Thus, the system necessitates the production and maintenance of this exploited class, on the one hand, and a means of disciplining this population so as to avoid its rebellion, on the other. The true triumph of the system thus lies not in its ability to coerce populations or to manage widespread revolt but rather to generate ideological adoption of the system and its ‘conceptual apparatus’ among its subordinated classes.<sup>640</sup> Surely this is the contribution liberalism makes to the neoliberal project, championing notions of freedom, autonomy, and equality such that it becomes ‘that which we cannot not want.’<sup>641</sup> For Brown, this represents the normative effort of neoliberalism where every dimension of socio-political life is subjected to an economic rationality not simply on the basis that it is efficient to do so, but that it is also *right*.<sup>642</sup> Morality, within neoliberalism, simply *is* economic rationality. It is ‘configured entirely as a matter of rational deliberation about costs, benefits, and consequences.’<sup>643</sup> The effect is a construction of a particular ontology that is in service to neoliberal rationality. The ‘good citizen,’ within a moral paradigm based on economic rationality, is an entrepreneur.<sup>644</sup> She must engage in a strict regime of

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<sup>640</sup> This usually extends to critiques of the system as well. Wood observes that even Marxist analyses of the emergence of capitalism ‘conced[e] too much to standard histories of capitalist development’ when they focus on changes in technology or trade activities, attributing changes to the labour force (and modes of production) to developments in industrialisation (n 403), 66. Instead, Wood maintains that ‘[w]hat created the drive to intensify exploitation was not the emergence of steam or the factory system but rather the need inherent in capitalist property relations to increase productivity and profit,’ (n 403), 67. This points to the power of origin-less stories in the production and maintenance of foundationalist discourses.

<sup>641</sup> G. Spivak, *Outside in the Teaching Machine* (Routledge 1993), 44. In the same chapter, Spivak notes that it ‘is hard to acknowledge that liberal individualism is a violating enablement.’ Wendy Brown, when citing this exact excerpt, suggests it demonstrates how Spivak is ‘keenly aware of what liberalism cannot deliver, what its hidden cruelties are, what unemancipatory relations of power it conceals in its sunny formulations of freedom and equality,’ (n 639), 230.

<sup>642</sup> Brown, (n 623). Bruno Anili also suggests liberalism is able to gain validity on the basis of common usage, arguing that ‘[l]iberal discourse sounds intuitively “right” because it sounds familiar, because the content that it articulates conforms to the expression that it employs’: Anili, (n 188), 68.

<sup>643</sup> Brown (n 623), 42.

<sup>644</sup> This is what Ong has identified as the ‘market criteria on citizenship,’ whereby political belonging (and the distribution of rights and benefits) is determined on the basis of a person’s marketable skills rather than membership to a nation state: Aihwa Ong, *Neoliberalism as Exception: Mutations of Citizenship and Sovereignty* (Duke University Press 2007). This leaves those whose skills are deemed

managing risks according to a calculated assessment of the costs and benefits of each proposed action. To recall the phrasing of a sporting coach from the previous chapter, the moral responsibility of the neoliberal subject is to ‘economize oneself.’<sup>645</sup> Failure to do so, to ‘navigate impediments to prosperity,’ is an indicator of a ‘mismanaged life.’<sup>646</sup>

This model of a moral obligation to ‘manage’ oneself according to a normative ontology should strike the reader as familiar. As discussed in Chapter Three, the need to effectively balance one’s appetites and desires was an integral component to medieval understandings of health and salvation. Within the medieval frame, however, many of the values esteemed within a contemporary neoliberal context would have been considered vices. Greed, profit maximization, competition, increased privatization, and possessive individualism were conditions of appetites the medieval ‘good citizen’ needed to constrain. This forms the crux of consent’s role in the context of medieval medicine. It was the marker of the well balanced or ‘managed’ life. In his own analysis of the decline of ecclesiastical authority during the eighteenth century, Foucault argues that this pastoral power over the subject was merely taken up in another form. ‘It was no longer a question of leading people to their salvation in the next world,’ Foucault argues ‘but rather ensuring it in this world.’<sup>647</sup> This new context meant a shift in the meaning of ‘salvation’ from one focused on the after-life to one rooted in the values of an emergent economic rationality: wealth, security, and the liberty to pursue these on an

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not to have sufficient economic value outside the realm of citizenship or, to use Judith Butler’s phrasing, ‘stateless within the state’; Butler and Spivak (n 293).

<sup>645</sup> This is a paraphrasing of the words of Loïc Wacquant’s boxing coach who critiqued one of the rookie boxers for failing to ‘economize hisself.’ See Wacquant (n 597), 146.

<sup>646</sup> Brown (n 623), 42.

<sup>647</sup> M. Foucault, ‘The Subject and Power’ (1982) 8(4) *Critical Inquiry* 777, 784.

individualised basis. In the words of Margaret Thatcher: 'Economics are the method but the object is to change the soul.'<sup>648</sup>

This shift in political and ontological rationality warrants closer reflection for the insight it offers on the role the consent-as-autonomy narrative plays in the contemporary neoliberal context. Chapter Three's glance backwards to the medieval world allows for a clearer picture of how consent served as a means of both defining virtue and of facilitating conformity to this standard. The sick suffered because they had been sinful. Poor health was the marker of this unbalanced life. Consent was the means of remedying this, through conformity to a dominant (and Christian) way of being. Similarly, the Ancient context examined in Chapter Two demonstrates how consent marked the boundaries of 'good citizenship' both in terms of who was entitled to consent and in terms of what consent served to protect (i.e. patrilineage). What conformist subjectivities does consent serve today? To what end is this promise of autonomy? Gerald Cohen asked a similar question in a lecture he gave at the London School of Economics in 1980 when he sought to understand how certain kinds of liberals and libertarians could defend private property on the basis of an understanding of 'freedom' that did not recognize the 'unfreedom' of private ownership itself.<sup>649</sup> He answers this query by suggesting that at the heart of this position is a tendency to treat private property 'as part of the structure of human existence in general, and therefore as... *merely as things are*.'<sup>650</sup> Such a position, grounded in 'common sense' is unable to see the 'unfreedom' of private property; it is obscured, rendered unintelligible. Yet,

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<sup>648</sup> As cited in Harvey (n 631), 23.

<sup>649</sup> G.A. Cohen, 'Freedom, Justice, and Capitalism' (1981) 0(126) *New Left Review* 3.

<sup>650</sup> Cohen (n 649), 9 (emphasis in original).

Cohen urges, to ‘think of capitalism as a realm of freedom is to overlook half of its nature.’<sup>651</sup>

The relevance of this for the consent-as-autonomy story is perhaps best understood through an examination of how medieval trade practices were altered with the emergence of liberalism’s classical economic theories. The medieval marketplace was a setting of both stringent regulation and customary practices.<sup>652</sup> It was not a design of profit but of community sustenance. This is well evidenced by a 1768 pamphlet describing a farmer’s attendance at the market as ‘a material part of his duty; he should not be suffered to secret or to dispose of his goods elsewhere.’<sup>653</sup> Bread was a staple in most medieval diets. As such, there were a number of statutory and customary provisions which strictly regulated how the growth and sale of grain, flour, and corn should operate. Both millers and bakers were thought of as ‘servants of the community, working not for a profit but for a fair allowance.’<sup>654</sup>

Foucault assesses these characteristics of the medieval market as indicative of a model of distributive justice, where ‘the market operated to ensure that, if not all, then at least some of the poorest could buy things as well as those who were more well-off.’<sup>655</sup> This echoes some of the observations made by Lianna Farber with respect to the role of

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<sup>651</sup> Cohen (n 649), 10.

<sup>652</sup> As E.P. Thompson has described:

The farmers should bring their corn in bulk to the local pitching market; they should not sell it while standing in the field, nor should they withhold it in the hope of rising prices. The markets should be controlled; no sales should be made before stated times, when a bell would ring; the poor should have the opportunity to buy grain, flour, or meal first, in small parcels, with duly supervised weights and measures. At a certain hour, when their needs were satisfied, a second bell would ring, and larger dealers (duly licensed) might make their purchases; *Customs in Common*. (New Press 1991), 193-194.

<sup>653</sup> Anon. *An Enquiry into the Price of Wheat, Malt, etc.* (119-123); as cited in Thompson (n 652), 198.

<sup>654</sup> Thompson (n 652), 194.

<sup>655</sup> M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (M. Senellart (ed) and G. Burchell (tr), Picador Press 2008), 30.

consent in medieval trade where consent was less about establishing voluntariness in trade transactions<sup>656</sup> (as it is commonly employed in contemporary contract law) and more about the contemplation of ‘need’ and what could be considered a ‘just price.’<sup>657</sup> Where prices were set far above what the seller could reasonably be deemed to require for sustenance (or where usury was paid out of compulsion), consent was not possible. Again, this is not because the consent given for the trade might be considered ‘involuntary’ (a tempting – but retrospective – reading of consent) but rather because it was not in alignment with the ‘common good,’ or as Thompson might suggest, the customs the community held in common.<sup>658</sup> It was these customs that created the crowd’s ‘legitimizing notion’ which prompted riotous action when the market price was deemed too high. This legitimizing notion was rooted in a shared understanding of traditional customs which was supported by the wider consensus of the community. This consensus had significant force – rioters were frequently able to control the market price of food (often through violent protest) without fear of sanction from authorities who, as Thompson describes, were made ‘prisoners of the people’ as a result.<sup>659</sup> Thompson’s work details a number of highly descriptive examples, many of which dispel the more common explanation that riots were attributable to mere hunger (particularly where crowds entered mills or bakeries to destroy the goods rather than steal them).<sup>660</sup> Instead, these riots demonstrate the crowd’s role in setting the ‘just price’

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<sup>656</sup> Farber, (n 321), 94-95. Farber attributes this to the two central sources which influenced medieval authors’ considerations of voluntariness, i.e. classical Roman law and Aristotle’s *Nichomachean Ethics* – both of which endorsed the maxim, ‘forced will is will.’

<sup>657</sup> Farber traces much of this through an examination of medieval authors’ writings on usury (n 321), 93-97.

<sup>658</sup> This is similar to consent in the medieval medical forum, where consent was understood to be the means by which the sick could bring themselves into alignment with Christ (and/or Christian ideals held ‘in common’).

<sup>659</sup> Thompson (n 652), 189.

<sup>660</sup> See Thompson (n 652), 230-235. One particularly vivid example from West Cornwall is relayed where crowds were witnessed ‘visiting farms with a noose in one hand and an agreement to bring corn to reduced prices to market in the other,’ 229.

and the existence of what Thompson has described as ‘the moral economy of the crowd.’<sup>661</sup>

This moral economy was altered with the emergence of classical liberalism. Well encapsulated in Adam Smith’s *The Wealth of Nations*, this new theory called upon members of the market to simply ‘leave it alone,’ abandoning the strict regulations of the medieval economy so as to allow it to function on its own accord – a strategy, according to Smith and his disciples, which would permit the market to flourish rather than flounder amidst excessive and unneeded constraint. This was the work of Smith’s notorious ‘invisible hand,’ an unseen coordinator of the various individual interests and demands of the market’s participants, facilitating prices to ebb and flow according to the desires and distastes of human nature.<sup>662</sup> This had the effect of granting the market and its activity a certain epistemological authority.<sup>663</sup> If the market was merely functioning according to a set of ‘natural’ laws, the resulting prices (and commercial activity) must be, in some sense, true. It is in this way that Foucault suggests the market became a site of truth.<sup>664</sup> This had far wider-reaching effects than mere price-setting. The truth-telling power of the market also served to delineate what it meant to be a ‘good citizen,’ effectively de-moralizing the crowd’s ‘moral economy’ in favour of a supply and

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<sup>661</sup> Thompson, ‘The Moral Economy of the English Crowd in the Eighteenth Century’ (1971) 50 *Past & Present* 76. Foucault elaborates on this point, suggesting that the systems of regulations the medieval market had in place to ensure the presence of the ‘just price’ (and the absence of fraud) ‘meant that the market was essentially, and really functioned as, a site of justice, a place where what had to appear in exchange and be formulated in the price was justice,’ (n 655), 31.

<sup>662</sup> It is worth noting that some scholars have questioned the role of the ‘invisible hand’ in Smith’s work. See, for instance, Emma Rothschild’s work which argues that Smith’s use of it (in all three places where it appears in his works) is, at best, ironic and that it is not a concept that he would have endorsed without sardonicism: E. Rothschild, ‘Adam Smith and the Invisible Hand’ (1994) 84(2) *The American Economic Review* 319.

<sup>663</sup> As Foucault has observed, Smith’s ‘invisible hand’ was a remnant of ‘a theological conception of the natural order,’ (n 655), 278. This suggests the market was granted a sort of divine authority as well.

<sup>664</sup> In Foucault’s words: ‘When you allow the market to function by itself according to its nature, according to its natural truth, if you like, it permits the formation of a certain price which will be called, metaphorically, the true price, and which will still sometimes be called the just price, but which no longer has any connotations of justice’ (n 655), 31.

demand model of the common good. Central to this task was situating Smith's market economy as amoral so as to give it the effect of truth. As E.P. Thompson has argued:

It should not be necessary to argue that the model of a natural and self-adjusting economy, working providentially for the best good of all, is as much a superstition as the notions which upheld the paternalist model... Whereas the first appeals to a moral norm – what *ought* to be men's reciprocal duties – the second appears to say: 'this is the way things work, or would work if the State did not interfere.' (203).<sup>665</sup>

Here, the force of invoking an ahistorical truth ('this is the way things work') is rather apparent. The market rationality gains a sense of inevitability, thus obscuring modes of resistance - for how does one challenge that which has always been?<sup>666</sup> This is perhaps best demonstrated by the difficulty the contemporary reader has of envisioning an alternative to the human nature presumed (and produced) by free market rationalities.

As Thompson suggests,

[i]t is not easy for us to conceive that there may have been a time, within a smaller and more integrated community, when it appeared to be 'unnatural' that any man should profit from the necessities of others, and when it was assumed that, in time of dearth, prices of 'necessities' should remain at a customary level, even though there might be less all round (252-253).<sup>667</sup>

Studies like Thompson's reveal that despite accounts of capitalism and its market rationality as having always been or, perhaps more aptly, being merely the result of allowing persons to 'act freely,' there are alternative accounts of how communities might live together and the 'natures' of those that live within them. Further, this 'freedom fable' told by classical liberalism has had observable effects on prevailing

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<sup>665</sup> Thompson (n 652), 203. It should be noted that Thompson is careful to point out that several years of debate about corn regulation laws resulted in a repeal of the legislation against forestalling (i.e. selling in advance of market stalls) four years prior to the publication of Smith's work: 201.

<sup>666</sup> In keeping with the religious values of the medieval period, proponents of Smith's theory characterized its opponents as 'enemies both to God and man, opposite both to Grace and Nature': Thompson (n 652), 254 (citing Fitz-Geffrey, 1648 reprint, 7).

<sup>667</sup> Thompson (n 652), 252-253. David Harvey echoes this sentiment in slightly more generalized language (in a chapter titled 'The Construction of Consent') when he suggests that as neoliberalism made its way into common-sense understandings, '[t]he effect in many parts of the world has increasingly been to see it as a necessary, even wholly "natural" way for the social order to be regulated' (n 631), 41.



attitudes about not simply how the market ought to operate but also about what constitutes ‘good’ citizenship and ‘normal’ human behaviours and desires, suggesting ‘there is nothing merely economic about economics.’<sup>668</sup> The medieval subject stands in stark contrast to the liberal one which took its place, described by Wendy Brown as: ‘Fiercely autonomous and diffident... unencumbered by anyone or anything, independent in both senses of the term (free of dependents and dependency in civil society). [The liberal subject] is not oriented toward relationships and persons but toward self and things.’<sup>669</sup> Perhaps most pertinent to the present inquiry is the presumption that if the constitution of subjectivity can be seen to have been so dramatically changed with the introduction of an economic rationality, so too, must the law’s understanding of its subject have shifted. The ‘birth’ of *homo economicus* was met with a capitalist calculus for all aspects of the human condition, including the means by which law assessed criminal responsibility and meted out penalties.<sup>670</sup> ‘Crime and punishment were meant to be exchanged as costs and benefits like any other commodity, and punishment was an economic disincentive to crime.’<sup>671</sup> Surely within this frame, where human beings are self-interested, profit-seeking, and driven by rational choice, the exercising of one’s will, the rules of self-governance, and the very

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<sup>668</sup> J. Butler and A. Athanasiou, *Dispossession: The Performative in the Political* (Polity Press 2013), 39. Butler elaborates on this idea with a suggestion that to regard the economic domain as autonomous is to accept certain claims of ‘economic science and calculation’ that neoliberalism puts forth. She likens this to an earlier point made by Marx ‘that one of the achievements of capitalism was the analytic distinction between the domain of the social and the domain of the economic’ – a divide that is only traversed when neoliberalism is understood as a political rationality: 40-41.

<sup>669</sup> Brown, (n 125), 149.

<sup>670</sup> The work of both Nicola Lacey and Alan Norrie provide ample evidence of this. Note, in particular, Lacey’s account of the shift in law’s emphasis (for the purpose of determining criminal responsibility) from a medieval preoccupation with ‘character’ to the Enlightenment’s interest in ‘capacity.’ The former represents a valuing of ‘status’ and the role of communal judgments (and customs); whereas the latter is a ‘quasi-contractual’ understanding of criminal responsibility, one that prioritizes the *choices* the law’s subjects make: N. Lacey, ‘In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory’ (2001) 64(3) *Modern Law Review* 350; N. Lacey, ‘Responsibility and Modernity in Criminal Law’ (2001) 9(3) *Journal of Political Philosophy* 249; Norrie (n 179).

<sup>671</sup> Norrie (n 179), 20.

meaning of freedom itself must also have economic ‘worth.’<sup>672</sup> The last chapter’s examination of the consent defence in sport provides some evidence of a prevailing notion in the contemporary context that to be ‘free’ one must be able to expend one’s property, one’s bodily capital as one wishes. This is the bedrock of the libertarian position that views private property as the ‘embodiment of freedom,’ where

[u]nless people are free to make contracts and to sell their labour, or unless they are free to save their incomes and then invest them as they see fit, or unless they are free to run enterprises when they have obtained the capital, they are not really free.<sup>673</sup>

This suggests a grid of (economic) intelligibility is at work in law wherein human nature and action are evaluated for their (neoliberal) rationality. Consent must presumably also conform to this calculus. Consider, for instance, the observation Erik Olin Wright (2005) has made about consent as a ‘cost smart’ means of exploiting labour (given the expensive ‘overhead’ in extracting it coercively).<sup>674</sup> Or Randy Barnett’s claim that consent ensures maximum economic efficiency in contractual transactions.<sup>675</sup> While the contemplation of consent in a cost-benefit rubric may not appear as incongruous in contexts of labour relations or contract, what happens to law’s use of consent in the criminal and medical fields when its neoliberal logic is considered?

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<sup>672</sup> This may be the basis for Wendy Brown’s caution against envisioning social and political autonomy as ‘that which can be tinkered with independently of developments in the forces of capitalism’ (n 125), 11. She notes that ‘for Marx, liberalism is to capitalism something institutionally securing, discursively naturalizing, ideologically obscuring, and historically perpetrating the power of the dominant,’ 82.

<sup>673</sup> Gaus and Courtland, (n 101).

<sup>674</sup> E. O. Wright, ‘Foundations of a neo-Marxist class analysis’ in E. O. Wright (ed) *Approaches to Class Analysis*. (CUP 2005), 29-30. To be clear, Wright is not advocating this position. He presents this so-called ‘endogenous theory of the formation of consent’ as one of the ‘theoretical pay-offs’ that a Marxist class analysis (i.e. one that explores the notion of ‘class’ using the concepts of exploitation and domination) can bring to the table when the more normative (i.e. capitalism is oppressive and/or bad) claims are not as desirable.

<sup>675</sup> R. Barnett ‘Consenting to Form Contracts’ (2002) 71(3) *Fordham Law Review* 627.

### Exploring Consent within a Capitalist Logic: Revisiting Criminal and Medical Law

Those who could not carry their contractual obligations were now to appear 'anti-social', and to be confined under a new legitimacy. The scandalous and bizarre were to be placed under a revised medical mandate, in asylums that promised to cure and not merely to incarcerate. Law-breakers and malefactors were no longer to have the status of bandits or rebels, but were to become transgressors of norms motivated by defects of character amenable to understanding and rectification.<sup>676</sup>

In this excerpt, Rose and Miller identify the core of neoliberalism's moral epistemology, whereby what is thought to be ethically estimable and 'naturally' possible is in congruence with what is economically viable. Wendy Brown makes a similar point with respect to the normative ontology that a neoliberal rationality entrenches and propagates, through which the moral responsibilities (and understandings) of citizenship are economically defined.<sup>677</sup> Consent does not operate independently of this frame.<sup>678</sup>

Rather, as the observations made by Rose and Miller suggest, when a political rationality takes on a moral form, it gains the power to inform the aims and uses of government itself. Ideals such as 'freedom' or 'justice' take on particular ('economized') meanings within a neoliberal rationality and so, too, do the laws which are enacted in their name. Thus, the 'good citizen' is defined within an economic calculus – a framework that is also used to define what it means to be a 'good patient' (in medical law), a 'good player' (on the sports field), and a 'good girl' (in adjudications of sexual assault).

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<sup>676</sup> N. Rose and P. Miller. 'Political power beyond the State: problematics of government' (1992) 43(2) *British Journal of Sociology* 173, 180. Here, Rose and Miller are writing about the liberal doctrine of 'freedom' and its role in producing the normative subjectivities needed to 'make liberalism operable.'

<sup>677</sup> Brown (n 623).

<sup>678</sup> Vanessa Munro has argued that while social contract theorists, relying on the work of both Hobbes and Locke, posit consent as the 'master of law' this is a problematic claim. She contends that 'the assertion that consent is the master of law neglects or at least trivializes the complex and powerful ways in which the dictates of law and institutions of the state, once established, operate to construct the very mechanisms of, and parameters for communicating, consent'; V. Munro, 'Constructing Consent: Legislating freedom and legitimating constraint in the expression of sexual autonomy' (2009) 41 *Akron Law Review* 923, 926.

This points to two of the central ways consent can be seen to operate within (and as a component to) neoliberal rationality. The first is through invocations of the ‘common good’ and legal interpretations of public or social utility – a key factor in law’s delineation of the scope and content of consent. The second is the extension of this neoliberal ‘good’ onto individual ontologies, whereby certain behaviours and subjectivities are prescribed (and valorised) while others are not. Under the law’s rubric of ‘reasonableness,’ those actions (and actors) that best conform to neoliberal values of efficiency, calculated risk, and self-management are deemed ‘capable’ of consenting. The rest are effectively excluded from this legal performance of autonomy. The following two sections examine each of these factors that are used in the jurisprudence to limit consent (i.e. social utility and capacity) in further detail.

### *Social utility in a neoliberal world*

As discussed in previous chapters, judicial limits are often placed on consent in the name of social utility, where claims to autonomy (via consent) are over-ruled on the basis that the activity the accused persons were engaged in is thought to have no ‘good reason.’<sup>679</sup> As was noted in the previous chapter, these social utility arguments were initially used by the courts to rule against the availability of the defence of consent in circumstances where bodily harm was incurred merely for sake of profit.<sup>680</sup> Judicial views on boxing have since changed, as has the broad prohibition against exhibitions of sport for profit, as courts now explicitly acknowledge the ‘good reason’ of such events. This can be observed in the oft-cited Supreme Court of Canada judgement in *Jobidon* (1991) case where Gonthier J (writing for the majority) remarks:

<sup>679</sup> *Brown* (n 27). The ‘no good reason’ qualifier comes from a 1934 case, *R. v. Donovan* (n 158).

<sup>680</sup> *Coney*, (n 473). See the discussion of Sir Michael Foster’s summary of judicial treatment of this issue in his 1763 text, *Crown Cases and Crown Law*, (n 470). The American case, *Commonwealth v. Collberg* (1876), 119 Mass. 350 (Massachusetts Supreme Court), also ruled out the consent defence in boxing matches on the same basis, equating it with prize-fighting.

the policy of the common law will not affect the validity or effectiveness of freely given consent to participate in rough sporting activities, so long as the intentional applications of force to which one consents are within the customary norms and rules of the game. Unlike fist fights, sporting activities and games usually have a significant social value; they are worthwhile.<sup>681</sup>

Although the court does not elaborate on the ‘significant social value’ of sporting activities in *Jobidon*, the cases surveyed in the previous chapter demonstrated how contemporary courts distinguish between assault and sport on the basis of the latter’s quality as a ‘manly pursuit.’ Further, these cases provide evidence that the early profit-seeking exclusion delineated in *Coney* has not survived in contemporary treatments of the social utility of contact sports. Instead, the law’s treatment of violence that erupts on the professional playing field is adjudicated in ways that align with neoliberal ideals of calculated risk, the ‘manly pursuit’ of profit, and the unavailability of the consent defence for those players who had not adequately ‘economized’ their body capital.

This suggests that while claims to the ‘public interest’ are somewhat of a staple in the law’s dealings with consent, it is not a static category. Instead, understandings of what might be useful to society or ‘good’ for everyone are shifting concepts, as evidenced by the very different functions and values ascribed to consent in Ancient Greece, the medieval marketplace, or the contemporary sports field. Following the widespread adoption of classical liberalism and its endorsement of the social contract, consent has been inseparably connected to notions of the ‘common good.’ Freedom to act in the world is constrained by what’s good for everyone else living in it. But as these communities change, so, too, does the conceptualization of what will be of the most social value or use.

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<sup>681</sup> *Jobidon* (n 479), 766-767.

What, then, is socially utile in a neoliberal world? What does neoliberalism value?

Certainly, the components of individualism and its resultant responsabilisation<sup>682</sup> play a central role in the neoliberal understanding of the ‘common good,’ as do unfettered trade, competition, calculated risk, profit maximization, and governmental policies principled in non-interference. Yet, for all of its inferences about facilitating the ways in which citizens might live in the company of others, the neoliberal conception of what might be commonly good has very little to do with community. Rather, independence reigns supreme in neoliberal rationality, where individuals are ‘left alone’ to make their own decisions and live with the resulting consequences. The neoliberal ethic is thus a self-regarding one, rooted in the claim of universal self-interest. And while many commentators have suggested there is a need to temper this self-interest with some sense of ‘civic virtue’ so as to foster more social (if not distributive) justice or to preserve the sustainability and legitimacy of the market itself,<sup>683</sup> the ‘economic morality’ of neoliberalism conflates the good with the entrepreneurial. In such equations, civic virtue itself becomes a private, self-regarding matter.<sup>684</sup>

As noted in the previous chapter, the consent defence in sporting contexts provides some evidence of this economically motivated notion of social utility where what is thought to be ‘good’ is also that which fosters competitive aggression, effective risk

<sup>682</sup> These two components are discussed in further detail in the next section, ‘The capacity to consent.’

<sup>683</sup> See Barry Smart, *Economy, Culture, and Society*. (Open University Press 2003); see also the Lord Plant’s 2012 lecture series, *Religion and Values in a Liberal State* where it is argued that setting limits (as set by civic responsibility or virtue that is distanced from self-interest) on the market are essential to its sustainability. Plant suggests the principle of maintaining a sense of social obligation with respect to the market was well-recognized by Adam Smith, evidenced by his ‘impartial spectator’ theory: Plant, ‘Markets in their Place: Moral Values and the Limits of Markets’ (Lecture at the Museum of London 2012) <<http://www.gresham.ac.uk/lectures-and-events/markets-in-their-place-moral-values-and-the-limits-of-markets>>. Last accessed: 15 December 2013.

<sup>684</sup> This stands in stark contrast to the community-based model of civic virtue espoused in the medieval market, where contemplations of one’s needs (versus ‘greeds’) were essential to determining the ‘just price.’ See: Farber (n 321); and Thompson (n 652). Similarly, criminal responsibility was a matter of one’s character, established by testimony of one’s community members. As noted by Nicola Lacey: ‘the key question was whether the guilty defendant was a corrigible member of the law-abiding community,’ thus enforcing a ‘community consensus’ model of criminality: (n 670), 362.

management, and, perhaps above all, freedom of choice. Within a neoliberal rationality, however, this freedom is understood within a consumerist model, aptly described by David Harvey as the ‘liberty of consumer choice.’<sup>685</sup> It is an all but limitless ability to commodify. For instance, when asked to comment earlier this year on the increasing incidents of neurological disorders among professional athletes, the co-director of Boston University’s Center for the Study of Traumatic Encephalopathy, (himself a former professional athlete), suggested the league organisations were ‘trading money for brain cells.’<sup>686</sup> Within a neoliberal rationality, this is a fair trade. After all, *homo economicus* is, above all else, an entrepreneur of herself. This is a model of ‘goodness’ that some have argued has replaced the so-called ‘Protestant work ethic’ where labour itself (of the mind and body) was valued as a means of pursuing the good life.<sup>687</sup> Instead, the ‘modern citizen is not that of the producer but of the consumer’ where personal fulfilment, social good, and moral virtue are pursued through ‘purchasing power.’<sup>688</sup> This is a power to both buy and sell – be that barley or brain cells. Freedom within this rubric is not a liberty to labour, but rather a liberty to consume. ‘Choice’ is a selection from a range of options that are ‘marketed’ and promoted.<sup>689</sup> It is a freedom to make use of one’s bodily capital by selling or trading it for the best possible return.

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<sup>685</sup> Harvey (n 631), 42.

<sup>686</sup> Branch (n 449). This has become a frequently cited quotation in both the social and academic commentary on sports violence. See, for instance, Hanna Kong’s article which employs this phrase in its title (despite no reference to Chris Nowinski in the piece itself): H. Kong, ‘For the Love of the Game: Trading Money for Brain Cells’ (2013) 2(1) *Mississippi Sports Law Review* 115.

<sup>687</sup> Max Weber commented on the way in which a capitalist logic transformed the Protestant work ethic into an ideology that constrained freedom rather than enhanced it, suggesting:

The Puritan wanted to work in a calling; we are forced to do so. For when asceticism was carried out of monastic cells into everyday life, and began to dominate worldly morality, it did its part in building the tremendous cosmos of the modern economic order... In Baxter’s view the care for external goods should only lie on the shoulders of the ‘saint like a light cloak, which can be thrown aside at any moment.’ But fate decreed that the cloak should become an iron cage; *Protestant Ethic and the Spirit of Capitalism* (T. Parsons, tr, Charles Scribner & Sons 1958), 181.

<sup>688</sup> N. Rose, *Governing the Soul: The shaping of the private self* (Routledge 1990), 102.

<sup>689</sup> Nik Rose presents a view of modern life as structured entirely around the notion of ‘choice,’ where ‘[e]ntry into family life is represented as occurring out of the love that two individuals voluntarily declare for each other; remaining within marriage is a matter of decision rather than conformity to an eternally

The description of the accused which the court offers in one of the first criminal prosecutions of an athlete for in-game violence provides some evidence of this monetarily-driven conception of social utility and the proper use of bodily capital. In the Canadian case of *Green*, (discussed in detail in Chapter Four), the court described Green's evidence as 'that of a man who is very experienced in his sport, a man who undoubtedly plays boisterously, *as he is paid to*; he is well known and his reputation is well known, and other players respect that reputation, as they have to in the circumstances.'<sup>690</sup> The accused's act of violence is validated for the court by the fact that he receives financial compensation for his behaviour – an understanding that is supported by the game itself, where 'enforcers' are hired specifically to engage in on-ice fighting.<sup>691</sup> Further, the court doesn't describe the accused's actions as violent or assaultive, but rather as 'boisterous play,' keeping stride with the common law's tradition of valuing aggression and physical force in 'manly pursuits.' This is solidified in the *Green* judgment when the court explains its reasons for acquittal (on the basis of implied consent), noting that 'Mr. Green's action was instinctive, and... more protective

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binding undertaking; having or not having children should, it appears, be a personal choice. Leisure has been invented as the domain of free choice *par excellence*. However constrained by external or internal factors, the modern self is institutionally required to construct a life through the exercise of choice from among alternatives' (n 688), 227.

<sup>690</sup> *Green* (n 488), [16]. (emphasis added). Green was tried at the same time as his opponent, Wayne Maki, for the same incident. The case is often cited in Canadian jurisprudence as it represents the first time a member of the National Hockey League (and thus, professional athlete) was charged criminally for in-game violence.

<sup>691</sup> Brent Severyn, a former enforcer (although Severyn self-describes as a 'goon') with the National Hockey League (NHL) describes in-game violence as his 'trade' and notes that new, young players threatened not his place on the team but, in his words, his 'livelihood':

Tough guys have to be on at all times, ready to handle every new young player who wants to take their jobs and livelihoods... An enforcer must also have a feel for how a game is unfolding and continually take stock of his team's emotional state. Are the guys skating well? Do they seem up? If they need a wake-up call, you fight. If the other team has the emotional edge, you fight. The score also determines when you apply your trade.

Further, there is little ambiguity about whether his role on the team was about ice hockey or fighting when he suggests 'I might as well have left my stick and gloves on the bench.' B. Severyn, 'An enforcer's life is a daily battle' *Sports Illustrated* (21 September 2011). Online at: < <http://sportsillustrated.cnn.com/2011/hockey/nhl/09/19/brent.severyn.enforcer.life/>> Last accessed 10 December 2013.



in his own interests than anything else of his own safety. Having regard to those circumstances, I find Mr. Green not guilty.’<sup>692</sup>

This suggests that while hegemonic masculinity and pursuit of profit are valued in sport, they are even more estimable when sought in the face of personal risk (and for the aim of self-interest).<sup>693</sup> And while commentators might herald physical aggression and bodily contact as values in and of themselves in sport, these components are often described in economic terms whereby pain is regarded as a ‘currency’ with which young men might ‘purchase’ masculine identities.<sup>694</sup> In fact, it is difficult to find discussions of the social utility of sport which *don’t* cite its economic value.<sup>695</sup> The very first page, for instance, of a 1999 text entitled *Sport Matters*, under the heading ‘The social significance of sport’ reads as follows:

There is no need to support the contention that sport is significant by reference to facts and figures. It is enough to suggest a few measures which even people who are indifferent to sport or actively dislike it would find difficult to deny. Think, for example, of the following: the attention regularly devoted to sport in the mass media; the amounts of money, public and private, spent on sport; the dependency of business on sport for advertising; the growth of state involvement in sport for reasons as diverse as a desire to combat spectator violence and contribute to health or national prestige; the numbers of people who regularly take part in sport as performers or spectators, to say nothing of those who are directly or indirectly dependent on it for their livelihoods.<sup>696</sup>

In this description, the significance of sport seems grounded in a neoliberal understanding of social utility, where value is determined on the basis of economic

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<sup>692</sup> *Green*, (n 488), [22].

<sup>693</sup> The role of self-interest is discussed in further detail in the next sub-section on self-governance.

<sup>694</sup> M. Gard and R. Meyenn. ‘Boys, Bodies, Pleasure and Pain: Interrogating Contact Sports in Schools’ (2000) 5(1) *Sport, Education, and Society* 19.

<sup>695</sup> See, for example, Jones et. al. ‘From the Arena into the Streets: Hockey violence, economic incentives, and public policy’ (2006) 55(2) *American Journal of Economics and Sociology* 231. The article explores the positive correlation between in-game violence and spectator attendance at professional ice hockey games and the legal implications that flow from this. The article begins with a quotation from a former player who went on to become a general manager of a team, Bobby Clark, which reads: ‘If they cut down on violence too much, people won’t come out to watch... violence sells.’

<sup>696</sup> E. Dunning, *Sport Matters: Sociological Studies of Sport, Violence, and Civilization* (Routledge 1993), 1.

return. Within this calculus, freedom is the opportunity to pursue profit, commodify one's body, and risk injury – for the right price. This costs versus benefits equation is one of the central mechanisms of neoliberal rationality and is extended to all aspects of the socio-political world, including determinations of the value of human life itself.

There is perhaps no place where this is more poignantly evidenced than in the field of medical law where the language of 'cost savings' or 'resource allocation' is explicit in deliberations about medical treatment, quality of life, and the requisite procedures for informed consent. For some bioethicists, this is attributable to a particular character that 'best interests' considerations take on within a neoliberal rationality. As Jill Fisher has suggested, neoliberalism spawns a cultural logic wherein 'what is good for industry' is what is also deemed good for the citizenry.<sup>697</sup> This logic grants considerations of the 'public purse' an equal (if not central) stake in a number of bioethical debates, including decisions concerning the withdrawal of life-sustaining treatment. Some of the legal commentary on a recent high-profile Canadian case, *Rasouli v. Sunnybrook Health Sciences Centre*<sup>698</sup> provides some evidence of this.

Hassan Rasouli, a retired mechanical engineer, immigrated to Canada from Iran in April, 2010. In August of the same year, he was diagnosed with a benign brain tumour and underwent surgery in October, 2010 to have it removed. In the days following the surgery, Rasouli suffered an infection (bacterial meningitis) which resulted in

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<sup>697</sup> I have paraphrased Fisher slightly here so as to broaden the scope of her comments. Fisher's article looks specifically at pharmaceutical trials in the United States, thus her wording reads: 'what is good for industry must be good for America'; J. Fisher, 'Coming Soon to a Physician Near You: Medical Neoliberalism and Pharmaceutical Clinical Trials' (2007) 8(1) *Harvard Health Policy Review* 61, 64.

<sup>698</sup> *Cuthbertson v. Rasouli* (2011) ONCA 482 (C.A.)

significant neurological damage, respiratory failure, and reduced consciousness.<sup>699</sup> He was placed on life support and designated as being in a persistent vegetative state, with no prognosis for recovery. In December, 2010, his physicians sought consent from Rasouli's substitute decision maker (SDM) to remove the life support and transfer Rasouli to palliative care. Rasouli's SDM was his wife, Dr. Salasel, a qualified physician who disagreed with the attending physicians' prognosis. She maintained that Rasouli would regain cognitive ability and denied consent to withdraw treatment.<sup>700</sup> Amidst disputes with Rasouli's physicians about whether or not the SDM's consent was required to withdraw treatment, Dr. Salasel (Rasouli's wife and SDM) sought an injunction to prevent the withdrawal of life support.<sup>701</sup> This injunction was granted at the trial level and re-affirmed at the Court of Appeal. An appeal of this judgment was heard by the Supreme Court of Canada in December, 2012 and almost a year later, the Supreme Court affirmed the decision of the Court of Appeal, finding that the consent of Rasouli's SDM was needed to withdraw treatment.<sup>702</sup>

The case has solicited a fair amount of commentary among legal scholars, bioethicists, and public opinion about the value of life and the circumstances in which consent can and should be required. Arguments about social utility (traditionally a delimiter of consent in criminal law) have loomed large in these discussions, often presented within a neoliberal rhetoric. Hilary Young, for instance, frames the issue in the following way:

No one wants to deny care to a patient who could materially benefit from it, but advances in technology allow health practitioners to keep people alive even

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<sup>699</sup> *Cuthbertson v Rasouli (Litigation Guardian of)*, SCC Docket No 34362 (10 July 2012) (Factum of the Respondent, [9-12]).

<sup>700</sup> Interestingly, Rasouli did regain some abilities, resulting in a removal of the PVS (persistent vegetative state) designation and a re-designation of 'minimally conscious.' This change in his condition has not altered his attending physicians' prognosis of recovery.

<sup>701</sup> Rasouli's physicians cross-applied for an order confirming that no consent was required for withdrawal of treatment; Factum of the Appellant (n 699),[6].

<sup>702</sup> *Rasouli*, (n 4).

when there is no realistic prospect of improvement to their underlying condition. As a result, life-sustaining treatment *can* be provided, but as potential returns diminish and costs (including to the patient, in terms of invasiveness and suffering, as well as to the public purse) increase, it is not obvious that such treatment *should* be provided.<sup>703</sup>

Many arguments of this ilk are found in the literature discussing end-of-life care, often with reference to the term ‘medical futility,’ where proposed treatments are deemed to be ‘irrational’ or lacking in ‘good reason’ on the basis that they are unlikely to improve a patient’s condition. Yet, underlying this standard of reasonableness is an economic vision of (social) utility that defines the value of life with the labour (and ensuing product) it might provide. As Tom Koch (2011: 131) has suggested:

The invocation of cost as a rational criterion for limiting acceptable levels of care for the chronically and terminally ill is rooted in the late 19<sup>th</sup> century redefinition of individual worth as a quotient of employability and productivity.<sup>704</sup>

Thus, determinations of medical futility rest on an understanding of ‘improvement’ of the patient’s condition that are not about extending life (as Hassan Rasouli’s request for continued treatment would do) so much as they are about treatment for patients who might cease to be economically burdensome.<sup>705</sup> These monetary concerns are also attributed a ‘common sense’ status in the legal and bioethical commentary on medically ‘futile’ cases, allowing the state’s economic interests to be positioned on equal footing with arguments about the sanctity of life, religious objections to treatment, and patient

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<sup>703</sup> H. Young, ‘Why Withdrawing Life-Sustaining Treatment Should Not Require Rasouli Consent’ (2012) 6(2) *McGill J. L. & Health* 54, 58-59 (emphasis in original).

<sup>704</sup> T. Koch, ‘Care, Compassion, or Cost? Redefining the Basis of Treatment in Ethics and Law’ (2011) 39(2) *Journal of Law, Medicine, and Ethics* 130, 131.

<sup>705</sup> Koch provides one famous example of an instance where doctors’ assessments of medical futility (based on an economic notion of productivity) were grossly mistaken: Stephen Hawking, who at the age of 21 was given no more than two years to live. Interventions to prolong his life were thought to be ‘futile,’ and yet despite on-going physical debilitation, Hawking has gone on to become one of the world’s leading physicists and researchers: (n 704), 134.

autonomy.<sup>706</sup> As articulated by the President of the Hastings Centre in his 1990 book, *What Kind of Life*: ‘The best medicine is that which contributes to the health that makes society run well, to achieve its appropriate ends.’<sup>707</sup>

These arguments about state resources and the gross expenditures on healthcare operate on the presumption that given the scarcity of these resources, allocations should be done for the greatest good. Yet, these contentions rely on a particular vision of what this social good is – one that values economic productivity above all else. In such a formulation, reasonableness or ‘rational’ decision-making is a matter of cost efficiency. However, despite the prevalence of concerns about health care resource allocations, courts have been reluctant to engage in explicit cost-benefit analyses in consent-based medical cases. In most instances, following an acknowledgement of the economic concerns, the courts have deferred to the legislatures on the matter. The House of Lords decision in *Bland* (1993) is a good example of this practice. Anthony Bland was a spectator who was crushed and asphyxiated at a football game when the stadium’s overcrowding safety measures failed.<sup>708</sup> As a result of the injuries he sustained at the stadium, Bland went into a persistent vegetative state for more than three years before his physicians (with the consent of his family) sought a court declaration that removing Bland’s life-support systems would not constitute a criminal offence. In their decision, the House of Lords made explicit note of the financial considerations of maintaining

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<sup>706</sup> Note, for example, a 2012 article in the *University of Toronto Medical Journal*, where the author states the matter almost defiantly: ‘Beyond the ethical and religious issues regarding the termination of medical treatment for the critically ill, there are serious economic issues – yes, *economic issues* – that cannot be ignored’; E. Nauenberg, ‘Beyond the *Golubchuk* case: The issue of intergenerational trends in medical expenditures’ (2012) 90(1) *UTMJ* 12 (emphasis in original).

<sup>707</sup> D. Callahan, *What Kind of Life? The Limits of Medical Progress* (Georgetown University Press 1990), 255; as cited in Koch (n 704), 133.

<sup>708</sup> *Airedale NHS Trust v. Bland* [1993] AC 789.

Bland's current condition, although they deferred judgment on these matters to Parliament, stating (under the heading 'Best interests of the community'):

Threaded through the technical arguments addressed to the House were the strands of a much wider position, that it is in the best interests of the community at large that Anthony Bland's life should now end. The doctors have done all they can. Nothing will be gained by going on and much will be lost... The large resources of skill, labour and money now being devoted to Anthony Bland might in the opinion of many be more fruitfully employed in improving the condition of other patients, who if treated may have useful, healthy and enjoyable lives for years to come... This argument was never squarely put, although hinted at from time to time. In social terms it has great force, and it will have to be faced in the end. But this is not a task which the courts can possibly undertake. A social cost-benefit analysis of this kind... must be for Parliament alone, and the outcome of it is at present quite impossible to foresee.<sup>709</sup>

Courts have seemingly come a long way since the turn of the twentieth century when such deference wasn't needed in the face of a more prevalent and widespread 'economic mind.' In the now famous case of *Buck v. Bell* (1927), involving the forced sterilization of a so-called 'feeble-minded' woman, Oliver Wendell Holmes wrote explicitly about the state's interest in restricting the number of economically dependent citizens.

Framing the issue entirely as a matter of 'public welfare,' Justice Holmes declared:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices... in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind... Three generations of imbeciles are enough.<sup>710</sup>

The words of Justice Holmes are jarring, particularly when juxtaposed with the more cautious language of the House of Lords in *Bland* (1993); yet, the clarity of the court's position in *Buck v. Bell* and its underlying economic motivations suggests that consent in the modern era performs a similar function as it has in past ages, i.e. a prescription of

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<sup>709</sup> *Airedale* (n 708), 896.

<sup>710</sup> *Buck v. Bell* 274 U.S. 200 (1927), 207.

normative subjectivity rather than an expression of personal autonomy. Holmes' meaning is clear: some persons are more deserving of life than others and the determinant of this desert is economic productivity. While contemporary medical jurisprudence may have toned down its rhetoric, the underlying principles of market morality remain operative when social utility is in play, even when pitted against hallmark principles of medical ethics, such as patient autonomy or personal dignity.<sup>711</sup> Where the treatment or procedure that is the subject of a patient's consent (or refusal thereof) is deemed to be too expensive or an inefficient use of state funds, social utility demands that it be over-ridden or disallowed.<sup>712</sup> The Canadian case of *Golubchuk*

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<sup>711</sup> Take, for instance, the 2011 decision of the United Kingdom Supreme Court with respect to a community care plan for Elaine McDonald in the case *R (on the application of McDonald) v. Royal Borough of Kensington and Chelsea*, [2011] UKSC 33. McDonald was 67 years old and had suffered a stroke several years before the proceedings which left her with severely restricted mobility. Due to a bladder dysfunction, McDonald needed to urinate frequently over the course of a night. Her mobility difficulties often presented a problem in this regard for her, including several falls, one of which broke both of her hips. When she was released from hospital, her local authority, the Royal Borough of Kensington and Chelsea (RBKC) underwent a needs assessment for her and, as part of an interim care plan, provided her with funding for a temporary caretaker to assist her in getting to and from a commode during the night. Her final needs assessment, however, resulted in a decrease of allotted funds on the basis that RBKC found it was 'preferable' that she use incontinence pads (at a significantly lower cost than that of a night-time caretaker). RBKC argued that McDonald's care had been 'changed to reflect [her] needs,' suggesting that incontinence pads would provide McDonald with 'greater safety, independence, and privacy' – all hallmark principles of neoliberalism. McDonald disagreed, contending that she was not incontinent and that to be treated as such was to infringe on her sense of personal dignity. In a letter notifying McDonald of the change in funds, RBKC stated: 'The council has a duty to provide care, but we must do so in a way that shows regard for use of public resources.' McDonald sought judicial review of the council's decision but at each stage of appeal, the decision of the RBKC was upheld. For a review of Lady Hale's dissenting opinion and the judicial backlash it received, see: H. Carr, 'Rational Men and Difficult Women: *R (on the application of McDonald) v. Royal Borough of Kensington and Chelsea* [2011] UKSC 33 (2012) 34(2) *Journal of Social Welfare and Family Law* 219.

<sup>712</sup> This neoliberal rationality can be seen in the changes some jurisdictions have made to the management of healthcare costs. The prospective payment system (PPS), for instance, has replaced the more traditional fee-for-service system in a number of jurisdictions (e.g. U.S., some members of the EU). This requires hospitals to prospectively determine healthcare expenses on the basis of a formula rather than bill post-service for actual costs. If the attending physician incurs more costs in delivering the health service(s) than was prospectively calculated, the hospital bears the difference. If the actual costs are less than what was prospectively calculated, the hospital enjoys a profit. For a review of these changes (up to 1990) and the effects they have had on physician decision-making; see M. Gregory, 'Hard Choices: Patient Autonomy in an Era of Health Care Cost Containment' (1990) 30(4) *Jurimetrics Journal* 483. For a discussion on how these economic pressures can be seen to change physician practice, see: M. Mehlman, 'Patient-Physician Relationship in an Era of Scarce Resources: Is there a duty to treat?' (1993) 25(2) *Connecticut Law Review* 349.

(2008)<sup>713</sup> and the ensuing commentary provide a good example of this rationality at work.

The facts of the *Golubchuk* case share some similarity with those of *Rasouli*. Samuel Golubchuk was an 84-year old Orthodox Jew who suffered severe brain damage following a fall in 2003. After several years of deteriorating health, Mr. Golubchuk was placed on life support at the Salvation Army Grace General Hospital in Winnipeg, Manitoba. Although he did have brain function, the level of this functioning was a point of dispute between Mr. Golubchuk's attending physicians and his family. The physicians advised Golubchuk's children that they intended to remove him from life support. Consent to do so was refused on religious grounds.<sup>714</sup> Golubchuk's children sought an injunction from the court to prevent the disconnection. This injunction was granted on a temporary basis, awaiting full disposition of the matter at trial; however, Mr. Golubchuk died (naturally in hospital) before the trial took place. During the legal battle, Golubchuk's physicians argued that consent was not needed to withdraw treatment – a principle that the Manitoba College of Physicians and Surgeons endorsed in a guideline it released in 2008 in response to the court injunction in Golubchuk's case.<sup>715</sup> This guideline stated that the final decision to withdraw treatment is one that lies with the attending physician and not with the family.<sup>716</sup> While this position received a fair amount of critical reception among bioethicists and legal scholars for its 'affront to the guiding principles of Western medical ethics: patient autonomy and

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<sup>713</sup> [2008] M.J. No. 54 (Man. Q.B.)

<sup>714</sup> *Golubchuk*, (n 713), [8-9]. The primary ground was that removing the ventilation tubes would amount to a hastening of death, which Golubchuk's family argued was prohibited by Orthodox Jewish law.

<sup>715</sup> For (critical) commentary on this guideline, see: J. Downie and K. McEwan 'The Manitoba College of Physicians and Surgeons Position Statement on Withholding and Withdrawal of Life-Sustaining Treatment (2008): Three Problems and a Solution' (2009) 17(1) *Health Law Journal* 115.

<sup>716</sup> A. Jotkowitz, et. al. 'The case of Samuel Golubchuk and the Right to Live' (2010) 10(3) *American Journal of Bioethics* 50.



human freedom,’<sup>717</sup> other commentators defend the position for its good ‘economic sense.’ As Bernard Dickens has noted with respect to the *Golubchuk* case: ‘If the patient’s life cannot be saved in a meaningful way and if intervention would deny resources that would benefit other patients... then the doctor is justified in clinical judgment to withhold treatment. Clinical judgment is not negotiated with patients.’<sup>718</sup> In this context, Justice Holmes’ decision in *Buck v. Bell* does not seem so distant a past.

Not only do economic conceptions of social utility influence determinations of medical futility and quality of life,<sup>719</sup> but there is also evidence to suggest this prevailing market morality serves to transform the kinds of subjects that are ‘free’ to consent and the functions this consent is meant to perform. Jill Fisher has argued that ‘medical neoliberalism’ represents a commodification of both healthcare and its delivery that effectively converts patients into consumers.<sup>720</sup> Aside from the emphasis on individualism that this consumer model propagates (discussed in further detail in the following section), there is a shift in what consent is understood to do when patients are thought to be ‘buying’ health products or services. Rather than an expression of patient autonomy, consent becomes a guard against physician liability. It marks the moment of

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<sup>717</sup> Jotkowitz, (n 716), 53.

<sup>718</sup> As cited in R. Cribb, ‘Lawsuit could set precedent about end-of-life decision’ *Toronto Star*, 4 September 2010. Online at: <  
[http://www.thestar.com/news/gta/2010/09/04/lawsuit\\_could\\_set\\_precedent\\_about\\_endoflife\\_decisions.html](http://www.thestar.com/news/gta/2010/09/04/lawsuit_could_set_precedent_about_endoflife_decisions.html)>. Last accessed: 15 December 2013. A similar argument is made by some ethicists with respect to cost considerations forming part of a physician’s professional and ethical duties, where ‘in addition to his role as caregiver, the physician is a gate-keeper who must subordinate the interests of an individual patient if necessary to attain societal cost containment objectives’: Mehlman (n 712), 352 (referring to the views of J. Glover and G.J. Povar, ‘The Ethics of Cost-Conscious Physician Reimbursement’ in J. D. Moreno (ed) *Paying the Doctor: Health Policy and Physician Reimbursement* (Auburn House 1991), 13-24.

<sup>719</sup> For a review of some recent cases that define ‘quality of life’ with economic productivity, see Koch (n 704). Among other similar cases, Koch describes a trend in the 1990s that denied organ transplants to patients with Downs Syndrome ‘because it was believed such persons were socially burdensome and thus less worthy than normal people’; 135.

<sup>720</sup> Fisher, (n 697).

consumer choice and the shifting of responsibility for the consequences of that choice from healthcare providers to healthcare consumers.<sup>721</sup> As Fisher notes:

Unlike patients, consumers seeking health care bear the responsibility for the choices they make – or fail to make – regarding their health. Because they are positioned as having the right to make choices about health care, consumers also have the obligation to utilize whatever products and services are available to ensure health or to treat illness and disease. This is not to say that medical professionals are not liable for malpractice claims. If anything, assessing the appropriateness of care is another burden on consumers, and malpractice suits serve as a means to make claims that the products and services they sought were not delivered as promised.<sup>722</sup>

Consent in this configuration serves as a legal ‘flak jacket’ – a term employed by Lord Donaldson in the English case, *W. (A Minor) (medical treatment)*,<sup>723</sup> referring to the protection against liability that consent confers on physicians against ‘the litigious.’ Margaret Brazier has described this model of consent in the following way: ‘Once consent is obtained, the doctor is protected from legal gunfire. Consent protects his [sic] back.’<sup>724</sup> The flak jacket was only one of two functions Lord Donaldson viewed consent as serving in medical law. The first was a clinical one, described in the judgment in a fashion strikingly similar to the role ascribed to consent in medieval codes of ethics governing the doctor-patient relationship. ‘The clinical purpose,’ Lord Donaldson stated, ‘stems from the fact that in many instances the co-operation of the patient and the patient's faith or at least confidence in the efficiency of the treatment is a major factor contributing to the treatment's success.’<sup>725</sup> The reader may recall that in the

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<sup>721</sup> These components of individualism and responsibilisation – each central to neoliberal rationality – are explored in further depth in the subsequent section, ‘Capacity and Self-Governance.’

<sup>722</sup> Fisher, (n 697), 65.

<sup>723</sup> [1992] 4 All E.R. 627; [1993] Fam. 64, 78. Lord Donaldson uses the term when revising an analogy he had employed in an earlier case (*Re R. (a minor) (Wardship: Consent to Treatment)* [1992] Fam. 11) of consent as a ‘key,’ suggesting that he now preferred ‘the analogy of the legal “flak jacket” which protects the doctor from claims by the litigious... Anyone who gives him a flak jacket (that is, consent) may take it back, but the doctor only needs one and so long as he continues to have one he has the legal right to proceed.’

<sup>724</sup> M. Brazier, ‘Organ Retention and Return: Problems of Consent’ (2003) 29 *Journal of Medical Ethics* 30.

<sup>725</sup> *W. (a minor)* (n 726), 76.

medieval period, obtaining the patient's consent was thought to be integral to the success of the treatment, even if obtained through deception. The giving of consent, in a medieval context steeped in religious conviction, took on a ritual form. Rather than an expression of freedom, the medievalist viewed consent as submission (to God, via the other.) Although most of this religious context has been replaced by a clinical and positivist one, ritual persists in the contemporary process of informed consent. Ethnographic studies of patients' experiences with the consent process affirm the notion that the informed consent form is often viewed as merely a 'technicality' or part of the intake or assessment procedures patients experience prior to treatment, rather than a moment for substantive discussion or autonomy.<sup>726</sup> Market morality forms the backdrop of this patient experience. A conception of the physician's time as limited (and more 'valuable' than that of the patient) and hospital resources as strained contribute to patients' perceptions that compliance is the most expedient way forward.<sup>727</sup> As noted by a participant in a 2006 ethnographic study of the reasons women consent to surgery:

[...] the last thing they need is somebody turn round and saying 'I've changed my mind I don't want to have this,' because it messes you know all their sort of thing up.<sup>728</sup>

At times, this perception can shift to a direct feeling of coercion, as demonstrated by another participant in the same study:

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<sup>726</sup> M. Dixon-Woods et al, 'Why women consent to surgery, even when they don't want to: A qualitative study' (2006) 1 *Clinical Ethics* 153; P. Meredith, 'Patient participation in decision-making and consent to treatment: The case of general surgery' (1993) 15(3) *Sociology of Health & Illness* 315. One participant in Dixon-Woods' study encapsulates this view in the following comment: 'Well they're [consent forms] all standard, standard protocol, isn't it, what you have to do, and I just go with the flow and sign 'em,' 155.

<sup>727</sup> Dixon-Woods, et. al. cite Strong's (1979) study on the ceremonial nature of the clinic as support for this point, suggesting that 'power is produced and maintained in the doctor-patient relationship through the ritualized nature or ceremonial order of the doctor-patient encounter, which may mask power differentials through the imperative to preserve an apparently harmonious encounter,' (n 726), 155.

<sup>728</sup> Participant 14, as cited in Dixon-Woods (n 726), 155.

Yeh, because they were there really pressurising me. It was like I was signing for a loan or something, and they had got this pen and they go 'right then are you ready to sign' and you just feel like they are stood there, waiting for me [...] they had got a load of other patients and I am thinking well you really haven't got time to, they are busy which I do appreciate that they are busy.<sup>729</sup>

This suggests that within a frame of 'common economic sense,' patients are aware of an unwritten code of conduct that encourages acquiescence and discourages argumentation, conflict, or active questioning, all in the name of cost efficiency. To act outside the ambit of these rules is to risk losing one's status as a 'good patient,' thereby losing a perception of one's reasonableness, and, in turn, one's capacity to consent. This is not unlike accounts from young women who claim to have difficulty saying 'no' when negotiating sexual encounters as a result of the 'unwritten rules' about sexual norms, gender roles, and social expectations.<sup>730</sup> To act assertively, to 'own' one's desire, to change one's mind or to stop a sexual encounter once it has begun is to risk losing one's status as a 'good girl' just as to shy away from aggressive behaviour on the playing field or to misuse one's bodily capital is to risk losing one's reputation as a 'good player.' These acts of non-conformity with the unwritten rules are the makings of *Buck v. Bell*'s 'undesirables'; those subjects for whom consent is not available due to a lack of (neoliberal) reason or social utility. Consenting subjects must govern themselves accordingly to be granted the *capacity* to consent and this governance requires strict adherence to a neoliberal rationality.

<sup>729</sup> Participant 15, as cited in Dixon-Woods (n 726), 155.

<sup>730</sup> A. Powell, 'Amor fati? Gender habitus and young people's negotiation of (hetero)sexual consent' (2008) 44(2) *Journal of Sociology* 167.

*The capacity to consent: An act of self-governance*

Neoliberalism, acting as political rationality, serves as a form of governmentality insofar as it operates through what Foucault has called ‘technologies of the self.’<sup>731</sup> Broadly defined, these are methods through which a state or ruling class is able to govern others by requiring (both juridically and ethically) that citizens exercise self-control, in essence, governing themselves.<sup>732</sup> This ethic of *self-governance* stems from two central components to neoliberal rationality, namely: individualism and responsibilisation. Built on the model of the self-interested individual of classical liberalism, neoliberal rationality posits a social world made up of atomistic agents, each tasked with self-determination. One’s life circumstances, in a neoliberal world, are thought to be the consequences of one’s actions and one’s choices. Predictably, this is one of the elements of neoliberalism that sustains the greatest critique from communitarians, where the argument that human life is inherently social (rather than individualistic) is used to buttress claims that the complex web of inter-relationships among and within communities should be the basis for legal and political action.<sup>733</sup> Further, ignoring these relational components to human life allows neoliberal regimes to set aside the ways in which different social groups might enjoy undue privilege or work to oppress and exclude others.<sup>734</sup>

Hand-in-hand with the emphasis on individualism is the process of responsibilization that neoliberalism puts in play. Neoliberal rationality espouses the view that individuals

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<sup>731</sup> Both Wendy Brown (n 623) and Thomas Lemke (n 624) make this point.

<sup>732</sup> ‘[G]overning people,’ Foucault argues, ‘is not a way to force people to do what the governor wants; it is always a versatile equilibrium, with complementarity and conflicts between techniques which assure coercion and processes through which the self is constructed or modified by [it]self’; as cited in Lemke (n 624), 53.

<sup>733</sup> For an approach to autonomy that takes these concerns seriously, see Nedelsky (n 56); and C. MacKenzie and N. Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (OUP 2000).

<sup>734</sup> See, for instance, Nicola Lacey’s essay, ‘Community in Legal Theory: Idea, Ideal, or Ideology?’ in *Unspeakable Subjects* (Hart Publishing 1998).

should be set free from the over-reaching arm of big government and left to their own pursuits, each aided (or marred) by the strengths and weaknesses of the individual. The heart of neoliberal autonomy is the freedom to pursue one's own interests and control one's own destiny (to the best of one's abilities), without the interference of state regulation. In this configuration, individuals who achieve less success or experience more hardship are merely the victims of their own failings. The state, having 'left alone' its citizens to their own pursuits, can hardly be blamed for their lack of success; rather, according to the neoliberal story, such disappointments are merely the result of the 'natural' order of things where some individuals simply have *more* than others: more skill, more competency, more luck, more ambition, more expertise.<sup>735</sup> These categories of 'more' are the stuff of human capital and unlike other forms of capital, are indivisible from the person that possesses them. '[M]ade up of two components: an inborn physical-genetic predisposition and the entirety of skills that have been acquired as the result of "investments" in the corresponding stimuli: nutrition, education, training and also love, affection, etc.,' citizens become entrepreneurs of themselves, seeking to gain ever greater return on their 'investments.'<sup>736</sup> Individuals are thus expected to 'take responsibility' for their own lives, recognizing their own strengths and weaknesses, and managing these effectively so as to reap the greatest benefit at the lowest cost.

These elements of individualism and responsibility lie at the heart of neoliberal rationality, and when coupled with the principle of non-interference, result in an imperative to 'look after one's self.' Within this ethic of self-care, individuals are tasked with making good choices, avoiding 'bad' risks, and assuming 'reasonable' ones. This

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<sup>735</sup> Note the lack of structural excesses, (e.g. more money, more opportunity). Within neoliberal rationality, these inequities are the result of individual successes/weaknesses, work ethic, and 'natural' talents.

<sup>736</sup> T. Lemke, "'The birth of biopolitics': Michel Foucault's lecture at the Collège de France on neo-liberal governmentality' (2001) 30(2) *Economy & Society* 190, 199.

standard of reasonableness, however, is rooted in neoliberal ideals of social utility and value. Some endeavours will simply be deemed too ‘costly,’ either, in the medical context, because of the toll a particular treatment might take on hospital resources (with an inefficient rate of return) or, in the criminal law context, because the prospects of criminalization are simply too high to warrant an action in the first instance.<sup>737</sup> In some circumstances, unreasonably risky behaviour will be that which falls outside the normal ‘rules of play,’ an ambit, of course, which varies depending on the socio-legal context. On the sports field, for example, although professional athletes are expected to risk injury during the course of a game, they must do so in a way that doesn’t reduce the overall value of their bodily capital. The athlete’s body is both capital and the tool to obtain it, therefore reasonableness demands a certain ‘corporeal thrift’ in its usage. As Wacquant has observed, ‘one must make use of one’s body without using it up.’<sup>738</sup> This also serves to delineate what forms of self-care (and surveillance) will be deemed ‘rational.’ Take, for example, the following description offered of the body work of boxers:

The boxer comes to consider his body, especially his hands, as his stock-in-trade. Boxers have varied formulas for preventing their hands from excess swelling, from excessive pain, or from being broken. This does not mean a hyperchondriachal interest, because they emphasize virility and learn to slough off and to disdain punishment.<sup>739</sup>

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<sup>737</sup> This notion of criminal conviction as a ‘cost’ is one put forth by Richard Posner in his positive economic analysis of sexual assault. See R. Posner, *Sex and Reason* (Harvard University Press 1992) – a book that solicited a great deal of feminist critique. For a collection of these, see 25(2) *Connecticut Law Review*.

<sup>738</sup> Wacquant (n 597), 130. This same ‘conservation ethic’ forms part of the *habitus* around sexuality for young women, many of whom are counselled (both socially and culturally) to ‘save’ themselves for marriage, reinforcing the ‘value’ ascribed to women for their bodies. Neoliberal rationality is not alone in making this ethic a ‘reasonable’ one, rather, so is a patriarchal culture that, to employ a radical feminist rhetoric, understands sex to be what women are for. See: C. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989), in particular, Chapter #9.

<sup>739</sup> S.K. Weinberg and H. Arond, ‘The Occupational Culture of the Boxer’ (1952) 57(5) *American Journal of Sociology* 460, 462; as cited by Wacquant (n 597), 129.

This passage speaks both to the ideals of hegemonic masculinity that the last chapter found endorsed in criminal law's assessment of 'harm' in sports violence cases, and to the commodification and maximization of capital that neoliberal rationality demands.<sup>740</sup> Where boxers do not follow these kinds of regimes to protect their 'stock-in-trade,' they are deemed to have taken unreasonable risks and thus, deserving of the consequences. As Wacquant notes, departures from this regime of 'corporeal discipline' are 'promptly interpreted as the direct cause of [the boxer's] failings in the ring.'<sup>741</sup>

These 'failings' extend beyond the sports arena to form an integral part of the law's assessment of the limits of consent. Where acts are deemed to be too harmful or without sufficient social value, the law prohibits the use of consent. Within a neoliberal rubric, persons are expected to engage in a strict regime of risk management, undertaking only those hazards that, on a cost-benefit analysis, are expected to yield sufficient profit to warrant the risk. This means there are some risks that will not be seen as 'reasonable' within a neoliberal rationality. Engaging in these excludes a subject from consent, marking the act (and actor) as 'undesirable' or 'without good reason.' These circumstances of 'excessive' or 'unreasonable' risk are seen as too harmful or without adequate social utility to allow for the invocation of consent. This is not unlike the process of Christian alignment that was demanded of medieval patients so as to bring them good health. In the contemporary period, all things must be 'aligned' with neoliberal ideals of reason and social value (or face the consequences). In this calculus, 'harm' is not a violation of bodily integrity, a creation of coercive circumstances, or a

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<sup>740</sup> In his description of the relationship between the boxer and the trainer, Wacquant highlights these components of neoliberal rationality: 'One of the major functions of the pair formed by the trainer and the manager is to modulate and adjust the trajectory of their charge over time so as to optimize the "return on pugilist investment" of the trio, that is, the ratio between the corporeal capital stacked and the dividends procured by fights in the form of money, ring experience, notoriety, and usable contacts with influential agents in the field such as promoters,' (n 597), 140.

<sup>741</sup> Wacquant (n 597), 147.



disavowal of personhood, but rather an interference with each individual's ability to self-govern, where self-governance is understood as a form of economic management of the self. If a person chooses to mismanage herself, it is her freedom to do so; but the ensuing damage is her responsibility to bear.

One of the loci where the neoliberal requirement of responsible risk management meets consent most explicitly is in the legal and social regulation of sex. Sexual assault law has a long history of presuming 'good girls' will avoid risky situations.<sup>742</sup>

Determinations of what kinds of behaviours or circumstances will constitute 'high risk' have largely been informed by stereotypical assumptions about female sexuality and gender roles, if not Victorian values of propriety.<sup>743</sup> At times, these cultural assumptions have been judicially recognized both for the harm they create for women and the difficulties they present to a variety of evidentiary and investigatory matters, such as determinations of credibility and levels of under-reporting.<sup>744</sup> One such instance, the Supreme Court of Canada case of *Seaboyer*, is significant because of the legislative

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<sup>742</sup> See, for example: M. Randall, 'Sexual Assault Law, Credibility, and "Ideal Victims": Consent, Resistance, and Victim Blaming' (2010) 22(2) *Canadian Journal of Women and the Law* 397; L. Gotell, 'Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women' (2008) 41(4) *Akron Law Review* 865; E. Sheehy, 'From Women's Duty to Resist to Men's Duty to Ask: How Far Have We Come?' (2000) 20(3) *Canadian Women's Studies* 98.

<sup>743</sup> The now infamous words of Justice McClung of the Alberta Court of Appeal in the landmark Canadian case, *R. v. Ewanchuk* (n 143), represent a good example of this value system at work in judicial discourse. Writing for the majority in a confirmation of the trial court's acquittal of the accused, McClung J noted: 'it must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines,' [4]. Notably, McClung is the grandson of women's rights activist, Nellie McClung – one of the 'Famous Five' who launched the so-called 'Person's Case' to have women declared 'persons' under the law in 1929: *Edwards et. al. v. A.G. Canada* [1930] A.C. 124.

<sup>744</sup> See, for instance, the Supreme Court of Canada case, *R. v. Seaboyer* (n 145). This case recognized sexual assault as the most underreported crime with an estimated reporting rate of 6%. In a more recent survey (2004 *General Social Survey*, Ottawa: Statistics Canada) the number of 'actual' incidents of sexual assault (aggravated assault and assault with a weapon inclusive) was 512,000 per annum. Police data in 2007 revealed that only 24,200 of these were reported, suggesting a reporting rate of 4.7%.

reforms it launched in Canada, including the first statutory definition of consent within Canada's *Criminal Code* and a list of circumstances in which consent is not possible.<sup>745</sup>

These provisions were interpreted for the first time in the *Ewanchuk* (1999) case, where the Supreme Court of Canada rejected a doctrine of implied consent for sexual assault. In a separate (concurring) judgment, Justice L'Heureux-Dubé noted that the 'case is not about consent, since none was given.'<sup>746</sup> Instead, the case was characterized as being about stereotypes of female sexuality, which rely on the notion that women say 'no' when they really mean 'yes.'<sup>747</sup> As a result, *Ewanchuk* instituted what has been called an 'affirmative consent' model where 'consent' must be communicated in a positive and verbal fashion.<sup>748</sup> Consent is thus defined, in Canadian sexual assault law, from the subjective standpoint of the complainant. While this has led some commentators to describe the *Ewanchuk* case as the 'no means no' decision, others have suggested it might more aptly be understood as a judgment that confirmed 'only yes means yes,' given its endorsement of a positive consent standard.<sup>749</sup> To satisfy the *mens rea* of the offence, the Crown must establish either that the accused knew the complainant was *not* consenting or that he did not take reasonable steps to ensure she was.<sup>750</sup> As the Court

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<sup>745</sup> Section 273.1(1) of the *Criminal Code* defines consent as 'the voluntary agreement of the complainant to engage in the sexual activity in question.' It forms a central component of the *Code*'s delineation of sexual assault provisions.

<sup>746</sup> *Ewanchuk* (n 143), [82].

<sup>747</sup> Justice McLachlin (now the Chief Justice of Canada's Supreme Court) noted this explicitly in her concurring reasons, suggesting the implied consent doctrine 'rests on the assumption that unless a woman protests or resists, she should be "deemed" to consent... On appeal, the idea also surfaced that if a woman is not modestly dressed, she is deemed to consent. Such stereotypical assumptions find their roots in many cultures, including our own. They no longer, however, find a place in Canadian law. I join my colleagues in rejecting them,' (n 143), [103-104].

<sup>748</sup> For a fuller explanation of this model, see Gotell (n 742) and L. Gotell, 'Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist inspired Law Reform' in C. McGlynn and V. Munro (eds.) *Rethinking Rape Law* (Routledge 2010).

<sup>749</sup> R. Ruparelia, 'Does "no" mean reasonable doubt: Assessing the impact of *Ewanchuk* on determinations of consent' (2006) 25(1-2) *Canadian Women's Studies* 167.

<sup>750</sup> The court in *Ewanchuk* relied on an earlier judgment of L'Heureux-Dubé's in the *Park* (1995) case, where she explained the mental element of the offence of sexual assault as "not only satisfied when it is shown that the accused knew that the complainant was essentially saying 'no', but is also satisfied when it

noted in *Ewanchuk*, ‘the trier of fact may only come to one of two conclusions: the complainant consented or not. There is no third option.’<sup>751</sup>

This requirement for reasonableness stems from the Court’s treatment of the defence of an ‘honest but mistaken belief in consent,’ where the court was clear about the need for an accused to rely on more than mere body language or assumptions when assessing whether or not the complainant was, in fact, consenting. As the majority judgment in *Ewanchuk* stated:

In order to cloak the accused’s actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused’s speculation as to what was going on in the complainant’s mind provides no defence.<sup>752</sup>

In rejecting a doctrine of implied consent in sexual assault cases, the *Ewanchuk* decision established a standard of explicit consent, where affirmative agreement on the part of complainant for the sexual activity in question must be obtained by the accused. Critics of the decision raised concerns about the practicality of such a standard, given the social awkwardness of having to gain permission for each stage of a sexual encounter, and the potential detriment the affirmative consent model might have on ‘seduction’ or customary sexual overtures – speaking, perhaps, to the power of prevailing gender norms and codes of intelligibility about sex.<sup>753</sup> Yet, others have praised the decision for the move it makes away from a view of sexual consent as a failure to resist and towards

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is shown that the accused knew that the complainant was essentially not saying ‘yes’” (at ¶ 39 of *Park*; cited at ¶45 of *Ewanchuk*, n 143).

<sup>751</sup> *Ewanchuk* (n 143), [31].

<sup>752</sup> *Ewanchuk* (n 143), [46] (emphasis in original).

<sup>753</sup> Don Stuart, ‘*Ewanchuk*: Asserting “No Means No” at the Expense of Fault and Proportionality Principles’ (1999) 22 C.R. (5th) 39. Elaine Craig has attempted to refute these claims, see: ‘Ten Years After *Ewanchuk* The Art of Seduction is Alive and Well: An Examination of the Mistaken Belief in Consent Defence’ (2009) 13(3) *Canadian Criminal Law Review* 247.

an explicit, voluntary expression of desire.<sup>754</sup> While, on one hand, this new approach to sexual consent has signalled a move away from the cultural assumptions about female sexuality that have previously informed beliefs about what constitutes a ‘good girl,’ the standard of reasonableness that is applied to judicial determinations of the mistake defence continues to operate within a neoliberal rationality. As Lise Gotell has argued:

Recent Canadian decisions recognize sexual autonomy, but in a form that is consistent with individuated norms of criminal law. Normative sexual interaction is reconceived as being like an economic transaction and good sexual citizens are reconfigured to resemble rational economic actors assuming responsibility for their actions and the risks that they take.<sup>755</sup>

Despite the impetus to eliminate harmful stereotypes about women and their sexuality from sexual assault law (and the criminal justice system’s response to it), the neoliberal components of individualism and responsabilisation function to maintain victim-blaming practices in the law’s dealings with consent. While Canadian courts have set limits on the ‘honest mistake’ defence, requiring that it be ‘reasonable’ and not held in the face of wilful blindness or recklessness, judicial interpretation of the circumstances that might inform a sense of reasonableness often focus on the behaviour or characteristics of the alleged victim(s) and the effect these may have had on an accused’s perception of consent.<sup>756</sup> As Justice L’Heureux-Dubé noted in the *Ewanchuk* case, in response to the comments made by the appellate court judge about the complainant’s style of dress, her living arrangements, and her status as an unmarried mother:

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<sup>754</sup> Sheehy (n 742); Gotell (n 748).

<sup>755</sup> Gotell (n 748), 216.

<sup>756</sup> Lucinda Vandervort has observed that in some instances, even making the defence of ‘honest belief’ available to a jury to consider represents a ‘flagrant example of the preference for, and the tendency to revert to, “local common sense” and “local social norms” in legal interpretation, in defiance of decades-long efforts by the Supreme Court of Canada to clarify the law on the point at issue’; L. Vandervort, ‘Lawful Subversion of the Criminal Justice Process? Judicial, Prosecutorial, and Police Discretion in *Edmondson, Kindrat, and Brown*’ in E. Sheehy (ed.) *Sexual Assault in Canada: Law, Legal Practice & Women’s Activism*. (University of Ottawa Press 2012), 140. Vandervort has also written about the exculpatory rhetorical power of the term ‘honest belief,’ see: ‘Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and *Mens Rea* in Sexual Assault’ (2004) 42(4) *Osgoode Hall L.J.* 625.

[O]ne might wonder why [McLung J] felt necessary to point out these aspects of the trial record. Could it be to express that the complainant is not a virgin? Or that she is a person of questionable moral character because she is not married and lives with her boyfriend and another couple? These comments made by an appellate judge help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity. Based on those attributed assumptions, the implication is that if the complainant articulates her lack of consent by saying “no”, she really does not mean it and even if she does, her refusal cannot be taken as seriously as if she were a girl of “good” moral character. “Inviting” sexual assault, according to those myths, lessens the guilt of the accused.<sup>757</sup>

Even where these myths do not present themselves in judicial discourse as explicitly as they did in *Ewanchuk*, the credibility of rape complainants is assessed as a matter of risk management. Did she exhibit ‘questionable judgment’?<sup>758</sup> Did she drink too much, leaving her ‘disinhibited’ or feeling ‘flirty’?<sup>759</sup> Did she engage in ‘bizarre’ or ‘abnormal’ behaviours without ‘good reason’?<sup>760</sup> Was she ‘foolish’ or old enough to know better?<sup>761</sup> Lise Gotell has suggested these investigations into the ‘risky’ behaviour

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<sup>757</sup> *Ewanchuk* (n 143), [89].

<sup>758</sup> Lise Gotell has noted the use of this discourse in cases even where convictions have been reached, as was the case in *R. v. C.R.N.* [1999] O.J. No. 3918 where the court stated: ‘It is not unfair, I think to say, putting herself in this setting was of questionable judgment, questionable maturity, careless and without much concern for her personal security,’ [14], as cited in Gotell, (n 742), 879. This discourse also appears in cases where the ‘poor risk manager’ is not the complainant but her caretaker, as was the circumstance in the case *R. v. K.R.B.* [2005] A.J. No. 1329 where the mother of a child who had been sexually assaulted by her father was critiqued for the ‘questionable judgment’ she displayed in not foreseeing the assault, [18].

<sup>759</sup> In the case, *R. v. J.R.* [2006] O.J. No. 2698, despite finding the complainant’s testimony compelling and thus determining that she did not consent, the court considered her level of intoxication and her testimony that being drunk had ‘made her “flirty” in the past and that she had done things while drunk that she later regretted,’ as factors relevant to the accused’s defence of an honest but mistaken belief in consent. This defence was rejected, however, and the accused was convicted – although one of the factors the court found most compelling in believing the complainant did not consent was the fact that she had had an abortion a few days earlier and was told by a physician to avoid intercourse.

<sup>760</sup> Lise Gotell has noted the presence of these discursive moves in the *R. v. A.J.S.* (2005) 192 Man. R. (2d) 4 (Manitoba Court of Appeal) case where the court questioned the behaviour of the complainant, an aboriginal woman living in severe poverty in a remote, rural community, when she visited the accused to borrow a lawnmower. Gotell cites the court for its inquiry: ‘Why would she put herself at risk of being raped for the sole reason of borrowing a lawnmower to cut the grass?’ [17]; as cited in Gotell (n 748), 217.

<sup>761</sup> In reviewing the sentence for an offender who had sexually assaulted the complainant (in addition to choking her), the British Columbia Court of Appeal in *R. v. Baker* [1990] B.C.J. No. 1995, made the following observation: ‘The complainant was not a very young woman. She was approximately 35 years of age. She was probably extremely foolish in entering the residence at that hour of the morning but that does not justify the assault upon her,’ 1996.

of rape complainants represents a ‘revised form of victim-blaming.’<sup>762</sup> This is well evidenced by a passage in a 2008 Canadian case where two men were convicted after drugging and sexually assaulting a woman (J.M.) they met in an online chatroom:

J.M. communicated with a stranger who contacted her out of the blue on the internet. She flirted with him and foolishly agreed to meet, giving him her name, address, and telephone number. She knew that he had mentioned bringing alcohol and drugs and she did contemplate the possibility of a sexual encounter with him. When he showed up at the residence with his friend, she voluntarily got into the car... J.M.’s continued attempts to minimize her provocative and foolish behaviour stemmed from her intense embarrassment that she allowed herself to get into the situation in the first place.<sup>763</sup>

While most legal scholars would be quick to argue consent operates differently in sexual circumstances than it does on a sports field,<sup>764</sup> these assessments of sexual assault complainants’ risk management behaviour suggest the same line of thinking is at work in both contexts. Consent in the sports arena is confined to the ‘reasonable expectations of play.’ As such, by stepping onto the ice, a hockey player is deemed to have consented to a certain degree of force or injury, provided it occurs in a circumstance that is ‘usual’ or falls within the normal rules of the game. In a study examining the public discourse surrounding the *Ewanchuk* case, Wright cites the following Letter to the Editor that was submitted to a national newspaper by a Canadian lawyer:

Actions speak louder than words. What on earth was the female complainant doing engaging in mutual massage with a man she had never met before in the

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<sup>762</sup> Gotell (n 748), 217.

<sup>763</sup> *R. v. Sadaatmandi* [2008] B.C.J. No. 405, [86]; as cited in Gotell (n 748) 217. See also: T. Lindberg, et. al. ‘Indigenous Women and Sexual Assault in Canada’ in Sheehy (n 756), 87 for an analysis of three cases involving the sexual assault of a 12 year old aboriginal girl by three non-aboriginal men. The authors identify a series of irrelevant factors (pertaining to the victim) that were considered by the courts in their adjudication of the accused’s guilt (e.g. level of intoxication, history of sexual abuse, experience in sex work).

<sup>764</sup> C. Hanna, ‘Sex is Not a Sport: Consent and Violence in Criminal Law’ (2001) 42(2) *Boston College L.R.* 239.

privacy of his own trailer? And yes, her rather skimpy attire would do nothing to discourage his allegedly unwanted advances in the course of the massage.<sup>765</sup>

Here, the reference to ‘reasonable expectations’ is all but explicit. The complainant’s clothing, her act of entering the accused’s trailer (under the auspices of a job interview), and her engagement in ‘mutual’ massage (throughout which she repeatedly told the accused ‘no’) are all viewed as indicators of poor risk management, leaving her responsible for the consequences of these ‘choices.’ Consent is hardly an expression of autonomy in a context where it need not be uttered at all.<sup>766</sup> Rather, in the course of the ‘normal rules of play,’ women are denied consent precisely because they are deemed to be always giving it.<sup>767</sup>

Perhaps most problematically, these judicial assessments of a complainant’s level of life ‘mismanagement’ persist even where significant statutory reforms have been implemented with an aim for improving definitions of ‘consent’ and eliminating reliance on stereotypical views of women and their sexuality. The Scottish case of *HM Adv. v. Mutebi*<sup>768</sup> is a good example. In this case, the complainant had become significantly intoxicated at a friend’s home before visiting a nightclub in Glasgow

<sup>765</sup> J. Mahoney, Letter to the Editor, *National Post* (3 March 1999) A19; as cited in J. Wright, ‘Consent and Sexual Violence in Canadian Public Discourse: Reflections on *Ewanchuk*’ (2001) 16(2) *Canadian Journal of Law & Society* 173, 182.

<sup>766</sup> Sharon Cowan has made a similar argument when reflecting on the U.K. case, *R. v. Gardner* (2005) EWCA Crim. 1399, where a 14 year old girl is digitally penetrated while vomiting due to excessive intoxication. The accused (19 years old) pled guilty to one count of sexual activity with a minor. In the sentencing judgment, the Court acknowledges the victim’s ‘consent’ was both drunken and under-age, but consent all the same. Cowan fits the *Gardner* case into a long criminal law history of judicial reluctance to view self-induced intoxicants as ‘rapeable,’ citing an 1856 comment in *The Times* by Justice Willes that expressed doubt that sexual assault could be committed ‘upon the person of a woman who had rendered herself perfectly insensible by drink.’ For Cowan, this points to the asymmetry between consent and choice. She writes: ‘A 14-year-old girl who is extremely drunk and vomiting at a party, unable to communicate with a defendant about what he wants to do (to her), nevertheless, according to the Court, does appear to have the capacity to make the choice to consent. But what was her range of realistic options whilst in this state? For autonomy and choice to have any positive meaningful content, they have to be accompanied by a range of options to choose from’; Cowan, (n 19), 57.

<sup>767</sup> This is an argument Carole Pateman has made, suggesting that to ‘begin to examine the unwritten history of women and consent brings the suppressed problems of consent theory to the surface. Women exemplify the individuals who consent theorists have declared are incapable of consenting. Yet, simultaneously, women have been presented as always consenting, and their explicit nonconsent has been treated as irrelevant or has been reinterpreted as “consent”’ (n 122), 150.

<sup>768</sup> [2013] H CJAC 142.

where she continued to drink. She left the nightclub and CCTV footage demonstrated that she was visibly intoxicated and unstable on her feet. She returned to her flat and while her memory of events is not entirely clear, she recalled meeting the accused (a stranger) outside her flat, kissing him, and then ‘coming to’ in her bed amidst sexual intercourse with the accused. The complainant testified saying ‘no’ at this time, at which point the accused left the flat (after stealing the complainant’s mobile phone and £170 from her wallet). The case was significant due to being one of the first to reach the Appeal Court following significant statutory revisions in the 2009 *Sexual Offences Act* to the definition of consent and the circumstances in which it would be vitiated (including excessive intoxication). Despite these reforms, the conviction of the accused for sexual assault was overturned at the Court of Appeal on the basis of the ‘reasonableness’ of the accused’s mistaken belief in consent. Rather than establish that the complainant’s state of intoxication was severe enough to vitiate consent (thus moving to an assessment of what steps the accused might have taken to establish his ‘reasonable’ albeit mistaken belief in consent), the Court appears to take the complainant’s severe intoxication level as evidence ‘that it was likely that she would have consented to have sex with a stranger who she met on the street while very drunk, rather than regarding this as something out of the ordinary or improbable.’<sup>769</sup>

This rationality prevails in the discourse of sexual assault prevention campaigns, where women are cautioned against walking alone at night, dressing provocatively, drinking too much, or leaving one’s drink unattended in mixed company. The ‘good girl’ will choose the well-lit route, will carry her handbag with cell phone and money close, and,

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<sup>769</sup> L. Farmer, ‘On the misinterpretation of the *Sexual Offences Act* 2009: *HM Adv v. Mutebi* (Case Comment, Personal Blog) <<http://obliqueintent.blogspot.ca/>> 12 November 2013; last accessed: 15 December 2013.



above all, follow her instincts.<sup>770</sup> These discourses are a part of the wider crime prevention literature that ‘implores us to reduce our possibilities of encountering crime. Indeed, it is a duty of good citizenship.’<sup>771</sup> Aside from positioning women as inherently rapeable,<sup>772</sup> these scripts reinforce a view of sexual assault as an individualised problem.<sup>773</sup> In congruence with neoliberal rationality, violence against women is not a social issue deserving of governmental intervention but rather an individual woman’s responsibility to guard against; to live her life in ‘proper alignment’ (to echo the medieval view of the consenting patient) so as to avoid injury. Provided a rape complainant has not led a ‘mismanaged’ life, she will be entitled to give (and refuse) consent.

A similar approach is seen in the literature for the prevention of sexually transmitted diseases, where individuals are tasked with ‘taking responsibility’ for not simply their own health, but that of others. This is perhaps best evidenced by the intervention of the criminal law in cases of HIV transmission where failure to disclose one’s positive status have resulted in convictions for aggravated assault<sup>774</sup> and criminal negligence,<sup>775</sup> each

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<sup>770</sup> Examples of these kinds of scripts in sexual violence prevention literature are abundant. To take merely one example, the New York State Police advise, on their website, that to prevent sexual violence, women (‘while dating’) should abstain from alcohol use, never accept beverages from someone they don’t trust, carry money for taxis or phone calls, and ‘follow your instincts: If a place or the way your date acts makes you nervous or uneasy, get out.’ Online at: <  
[http://www.troopers.ny.gov/Crime\\_Prevention/Violence/Date\\_Rape/](http://www.troopers.ny.gov/Crime_Prevention/Violence/Date_Rape/)> Last accessed: 15 December 2013. See also: E. Stanko, ‘Safety Talk: Conceptualizing Women’s Risk Assessment as a “Technology of the Self”’ (1997) 1(4) *Theoretical Criminology* 479, for an examination of U.K. police warnings to women about safety.

<sup>771</sup> Stanko (n 770), 486.

<sup>772</sup> S. Marcus, ‘Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention’ in J. Butler & J. Scott (eds), *Feminists Theorize the Political* (Routledge 1992).

<sup>773</sup> Conversation analysis studies have also suggested that ‘just say no’ strategies in sexual violence prevention campaigns serve to further enforce male norms of women’s sexuality. Based on analysis of other forms of refusals found in day-to-day conversation, Kitzinger and Frith, for instance, suggest ‘it should not... be necessary for a woman to say “no” for her to be understood as refusing sex’; Kitzinger and Frith (n 150). Instead, these policies can create assumptions about women that reinforce myths about their inherent submissiveness or low self-esteem.

<sup>774</sup> *R. v. Cuerrier* [1998] 2 S.C.R. 371. See also *R. v. Williams* [2003] 2 S.C.R. 134, where the charge of aggravated assault was reduced to attempted aggravated assault on the basis that the Court could not determine the exact point in time at which the victim became infected. Cornett reports that since the

on the basis that the consent to sexual intercourse is retroactively reneged on the basis that it was improperly or inadequately informed. Further, in each case, the risk presented by the offender's conduct is positioned as a danger to the public at large, and the result of a failure of the individual's responsibility to take adequate care in managing the risk of infection. It is this latter aspect of the criminal law's foray into the regulation of health risks that has elicited the greatest criticism from anti- or de-criminalization advocates. While some argue the criminal law is simply an inept tool for addressing public health concerns,<sup>776</sup> others have suggested the law's interventions serve to further stigmatize those already suffering from HIV and AIDS.<sup>777</sup> Yet, the law's response to these critiques has largely followed a route of soft paternalism, not unlike that of Mill's traveller about to cross a broken bridge. Rather than prevent her from crossing altogether, the soft paternalist merely seeks to ensure she is aware of the risks. As the English Court of Appeal argued in *Dica* (2005),<sup>778</sup> a case where the defendant had unprotected sex with two women while aware of his HIV positive status, rather than prohibit the defence of consent on the basis that it was given under false pretences (as the Supreme Court of Canada held in *Cuerrier*), the emphasis would instead be placed on the issue of risk.<sup>779</sup> '[R]isks have always been taken by adults consenting to sexual intercourse,' the Court argued, citing sexually transmitted

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*Cuerrier* decision, there have been 63 people in Canada who have been criminally charged for not disclosing their HIV positive status: M. Cornett, 'Criminalization of the Intended Transmission or Knowing Non-Disclosure of HIV in Canada' (2011) 5(1) *McGill Journal of Law and Health* 61.

<sup>775</sup> *R. v. Mercer* [1993] N.J. No. 198 (Nfld. C.A.)

<sup>776</sup> See, for example: E. Cameron, 'Criminalization of HIV Transmission: Poor Public Health Policy' (2009) 14(2) *HIV/AIDS Policy & Law Review* 63; and E. Cameron, et. al. 'HIV is a Virus, Not a Crime: Ten Reasons Against Criminal Statutes and Criminal Prosecutions' (2008) 11(7) *Journal of the International AIDS Society*, online: < <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2635346/pdf/1758-2652-11-7.pdf>>. Last accessed: 15 December 2013.

<sup>777</sup> See: E. Dej and J. M. Kitty. "'Criminalization Creep': A brief discussion of the criminalization of HIV/AIDS nondisclosure in Canada' (2012) 27(1) *Canadian Journal of Law & Society* 55; and Vandervort (n 756).

<sup>778</sup> [2005] All E.R. 593

<sup>779</sup> It is important to note that the Court in *Cuerrier* held that the duty to disclose should be determined on a 'sliding scale' in proportion to the degree of possible harm and the level of risk of its occurrence (n 774), [128]. For a discussion of this (in support of criminalization), see Cornett (n 774).

infections and unwanted pregnancies as examples. ‘Modern society has not thought to criminalise those who have willingly accepted the risks.’<sup>780</sup>

The Court in *Dica* draws a distinction, then, between consenting to bodily harm (which might not be permitted on public policy grounds) and consenting to the risk of this harm. The latter circumstance, the Court held, was too great an imposition on personal autonomy.<sup>781</sup> Implicit in this view of consent is the responsibilised individual, tasked with managing the risks s/he may encounter in life so as to yield the best outcomes. Note, for instance, the testimony of the complainants under cross-examination in the case, *R. v. Konzani*,<sup>782</sup> where the appellant had been convicted at trial on three counts of inflicting grievous bodily harm after failing to disclose his HIV positive status to three different women (who were later infected). In the transcript of the trial, the defence cross-examined the complainant as follows:

- Q. What did you know about him before you agreed to have sex with him?  
 A. Not much ...  
 Q. Did you realise you were taking a risk of becoming pregnant.  
 A. Yeah.  
 Q. Were you prepared to take that risk?  
 A. Yeah.  
 Q. Did you realise you were taking a risk of catching a disease?  
 A. Yeah.  
 Q. And were you prepared to take that risk? ...  
 A. Yes, I was, yeah.”<sup>783</sup>

The same line of questioning was put to the second complainant at trial:

- Q. You also realise that by having unprotected sex you risk catching an infection?  
 A. Yes ...  
 Q. ... That too is a risk that you took.

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<sup>780</sup> *Dica* (n 778), [49].

<sup>781</sup> Weait, (n 152).

<sup>782</sup> [2005] 2 Cr. App. R. 14.

<sup>783</sup> *Konzani* (n 782), [13].

A. Yes.

Q. That risk included the risk of contracting HIV didn't it?

A. Yes, but I didn't think about it at the moment.

...

Q. That means at the time you had unprotected sex?

A. Yes. ...

Q. But there was no discussion about HIV or tests or anything before you had sex?

A. Yes.

Q. You agree that there was no discussion?

A. Yes.<sup>784</sup>

In these excerpts, consent is positioned as a form of risk assumption, where the responsibility for 'getting informed' lies with the complainant, (i.e. the 'risk taker' in the *Dica* Court of Appeal's vision of the inherently risky activity of sexual intercourse.)<sup>785</sup> This is the same approach adopted by members of the HIV positive community themselves, as documented in a 2005 ethnographic study of barebackers,<sup>786</sup> each of whom expressed the view that one's health was a personal responsibility that included being informed and knowledgeable about the sexual choices one was making. Consent thus serves as a marker of this responsibility, as one of Adam's HIV positive participants noted:

When you consented to it ... if your other partners were willing to participate, it [condomless sex] was just a given. I just assumed that they take responsibility for their actions if they're willing to go along with it.<sup>787</sup>

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<sup>784</sup> *Konzani* (n 782), [20].

<sup>785</sup> This stands in stark contrast to the 'duty to disclose' standard endorsed by the Supreme Court of Canada in *Cuerrier* and, notably, by *Konzani*'s third victim who responded to similar questioning under cross-examination as follows:

Q. But you were actually on the subject of talking about HIV in Africa. Would it have been easy for you to ask him if he ...

A. No, it would have been easier for him to tell me. That's what I think. He had ... I didn't have the responsibility to ask him. He had the responsibility to tell me, (n 782), [27].

<sup>786</sup> 'Barebacking' refers to the practice of intentionally engaging in unprotected sex with new or unknown partners. Some scholars distinguish between this (self-labelled 'barebacking' practice) and the 'wider range of unplanned, episodic, unprotected sexual encounters' that occur, see: B. Adam, 'Constructing the neoliberal sexual actor: Responsibility and care of the self in the discourse of barebackers' (2005) 7(4) *Culture, Health & Sexuality* 333, 334.

<sup>787</sup> Adam (n 786), 340.

This responsabilisation model persisted even where partners were consenting under false information, as demonstrated by another one of Adam's HIV positive participants who reported the following exchange:

I said, "I'm positive. It's, you know, your ball game then. No problem." And he said, well, his quote was, "I'm a top and I have less risk of catching it." All right. And I said, "Well, that's your choice. It's a high risk. It's always your choice."<sup>788</sup>

Similar findings were reported by Michael Bartos in a 2002 study of safe sex practices among HIV positive persons in Australia, where it was argued that the self-interest promoted among the study's participants is not indicative of a 'callous disregard or reckless[ness]' but rather speaks to the prevalence of a neoliberal 'common sense' around consent that creates 'fewer bonds of social obligation' or duties of care to others.<sup>789</sup> Instead, it is a particular neoliberal view of autonomy that underlies these practices, one rooted in individualised risk management.

What is lost in such accounts of autonomy are, of course, the social and environmental inequalities that might affect one's choices or how the contexts in which these choices occur might themselves limit the available options. Jill Fisher offers the example of clinical pharmaceutical trials, where given the prevalent 'economic sense' that prioritizes healthcare costs over healthcare needs (where it doesn't equate the two), clinical research is positioned as a 'responsible choice' for those who require medical treatments they cannot afford. Fisher elaborates:

[P]ut another way, participation in clinical trials becomes almost a duty for those who have no other access to health care because it is available as a 'choice.' By privileging the individual and choice, a health care system mediated by neoliberal policies and cultural sensibilities tends to obscure the inequalities to

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<sup>788</sup> Adam (n 786), 340.

<sup>789</sup> M. Bartos, 'HIV-positive gay men's risk assessment and the changing meanings of HIV infection' in M. Hurley (ed) *Cultures of Care and Safe Sex amongst HIV Positive Australians* (Australian Research Centre in Sex, Health, and Society 2002) 45, 54; as cited in Adam (n 786), 344.

which those who participate in clinical trials tend to be subject. Within this frame, the systematic use of the uninsured or economically disenfranchised people as human subjects in pharmaceutical clinical development is not seen as being exploitive, but is instead positioned as an opportunity for members of those groups.<sup>790</sup>

This positioning also has a direct effect on the role of informed consent. While premised as a guardian of patient autonomy, this conceptualization presupposes a certain level of autonomy that many of the participants of clinical trials simply don't have. Most studies on informed consent within the clinical trial setting have shown that subjects' decisions to participate occur long before the consent form is presented or discussed and that such processes have little to no impact on study participation.<sup>791</sup> This has led Fisher to characterize the so-called 'ready to recruit' populations that pharmaceutical trials attract as 'ready to consent' – an observation that calls into question many of the reform strategies that bioethicists propose as a means of enhancing patient autonomy through consent.<sup>792</sup> For Fisher, such calls for more process-oriented approaches to informed consent or the 'partnership' model proposed by Robert Veatch and others, while laudable, don't speak to the realities of participants' experiences, particularly in the clinical trial setting. While Veatch has suggested that 'partners' in decision-making processes are entitled to know about benefits and risks, the purpose of the study, its underlying theory, and so on, assessing these factors is made more difficult in a context where the study itself has been designed by the physician and the economic needs of patients serve to characterize participation as 'responsible.' Fisher suggests this 'indicates that the process of informed consent actually begins *before* potential human

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<sup>790</sup> Fisher (n 697), 69.

<sup>791</sup> Fisher (n 697); J. Fisher, *Medical Research for Hire: The Political Economy of Pharmaceutical Clinical Trials*. (Rutgers, New York 2009).

<sup>792</sup> J. Fisher, "'Ready to Recruit' or 'Ready to Consent' Populations?: Informed Consent and the Limits of Subject Autonomy' (2007) 13(6) *Qualitative Inquiry* 875.

subjects are informed about the purpose, risks, and benefits of any given study.<sup>793</sup> But accounts from patients themselves suggest the problem with consent is not *when* it is requested but the context of inequality in which it occurs. As noted by Dixon-Woods following a qualitative study of 25 women on their experiences with consenting to surgery: ‘Women’s accounts emphasise that it is the *procedure* of consenting that is instrumental in producing their docility, and thus subverts the original intention of the consent process in ensuring their autonomy.’<sup>794</sup> This procedure is one which takes place within a neoliberal rationality, where state resources, considerations of human capital<sup>795</sup> (and its management) as well as the ‘ceremonial order of the clinic’ serve to constrain the freedom patients have to explore alternatives or make ‘non-normative’ choices.<sup>796</sup> Put quite simply, patients are aware of ‘the rules’ and consenting – even amidst uncertainty<sup>797</sup> or pain<sup>798</sup> or fear<sup>799</sup> – is how one maintains the status of being a ‘good patient.’

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<sup>793</sup> Fisher (792), 879.

<sup>794</sup> Dixon-Woods, (726), 157.

<sup>795</sup> Capital is derived from the differential valuation of time and experience among patients vs. doctors, but also, as Dixon-Woods suggests, ‘from specialist technical knowledge and skill... and the routines and tacit rules of the hospital and encounters between “lay people” and “professionals”’ (n 726), 157.

<sup>796</sup> Take, for instance, the account of refusing consent that is offered by one of Dixon-Woods’ participants whose profession was in health sciences, offering her a greater degree of capital than any of the study’s other patients:

[The nurse] puts the consent form in front of me and it’s got laparotomy. I went, “Whoa, I’m not having that, that’s major surgery.” [She] was lovely afterwards [once the doctor arrived] but she weren’t very nice before. No, no I wasn’t complying and therefore, you know, she didn’t want to know basically, I wasn’t making things very easy for them. But I think I was within my rights to question what they were doing and to voice my opinions, saying, “No I’m not having it done.” [...] I found it quite easy to say no to the doctors, because I’ve worked with doctors therefore I felt a different relationship with them, but I should imagine it could be quite frightening. But I wasn’t, I didn’t feel intimidated at all by them. (laughs) Not one little bit.’ (n 726), 156.

<sup>797</sup> ‘I’m just questioning you know, “God I just signed this form”, why (laughs) you know yeah, it’s weird. [...] No, no, I wasn’t saying yes I wanna go for a caesarean, I was just told to sign this form and so I signed this form’; Dixon-Woods, (n 726), 155.

<sup>798</sup> ‘I think the pain was taking over, I don’t think I was completely in, and I was on morphine anyway, I was having gas and air, so I don’t think I was completely compos mentis as such’; Dixon-Woods(n 726), 156.

<sup>799</sup> ‘I didn’t, I couldn’t see, I couldn’t see it, my mum held the pen to the paper where the box was and I just squiggled. [I] was scared, I cried, as soon as I did it. I cried cause I wasn’t sure what I’d let myself in for,’ Dixon-Woods, (n 726), 156.

These are concerns bioethicists and medical legal scholars have wrestled with for years, often noting the systemic inequalities of the doctor-patient relationship as a central motivating factor in reform strategies aimed at improving the informed consent process so as to increase patient autonomy. Yet what is overlooked in such analyses is the role which the autonomy story of consent plays in both producing and sustaining this context of inequality. Where consent can be seen to construct particular frames of subjectivity as intelligible, namely those that possess the characteristics of responsibilised neoliberal rationality, positioning consent as a ‘choice’ that is made by rational, calculating, and ‘free’ individuals obscures how this ‘choice’ is ‘in large part circumscribed, if not pre-determined, by the rules of the game in this particular field and the power relations contained therein.’<sup>800</sup>

The consent-as-autonomy story is a narrative about a type of liberty that is understood to be both hypothetical and potentially ‘harmful’ when left unrestrained. Even in the most ardent of anti-paternalism arguments, some means of limiting the choices of individuals is recognized as necessary. Taking account of the ‘public interest’ or ‘common good’ is the generally accepted way of establishing these parameters of autonomy – a practice well demonstrated in judicial treatments of consent. Yet, when the ‘good’ is understood to be that which is also economically ‘rational,’ the limits to what one might consent to (or of what ‘knowledge’ would be reasonable to have before making a choice) is also that which makes ‘good economic sense.’ This is perhaps the most compelling evidence of how consent operates as a form of self-governance, where one’s freedom to act is limited by the frame of (neoliberal) intelligibility that positions consent as a choice in the first instance. This narrative proclaims persons to be ‘free’ to

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<sup>800</sup> Dixon-Woods (n 726), 156-157.



consent to whatever they wish (provided they only wish acts or circumstances that conform to neoliberal understandings of social utility and ‘good reason.’) As Catharine MacKinnon has argued, there is ‘an unnoticed slippage’ from the ideals of freedom that consent is meant to signify to the law’s ‘actual rules that tacitly reflect and impose inequalities,’ resulting in consent having ‘an appeal it does not earn.’<sup>801</sup>

### Conclusion

This chapter has attempted to demonstrate that, while consent is often positioned in law and political theory as a signifier of inalienable freedom, it is a liberty that is heavily circumscribed by the norms of neoliberal rationality. Consent is limited to circumstances that are judicially determined to be of social utility and not harmful, where both ‘social utility’ and ‘harm’ are defined within an economic calculus. Where subjects consent in contexts that run counter to this rationality’s unwritten rules, (e.g. in situations that are too high risk or lacking in ‘good reason’) they are all the more distasteful for what these ‘choices’ demonstrate about the would-be-consenter’s ‘mismanaged’ life. Consenting in such contexts is a kind of *hubris*, to echo the view in Antiquity, and, as the medieval period suggests, such ‘sinfulness’ can only lead one to further ill. As Aquinas might argue, the social world is not privy to the inner wills of its citizens. Thus, true salvation can only be achieved on one’s own, through an exercise in self-regulation. Within a neoliberal context, individuals are ‘left alone’ to self-own and self-inspect, aligning themselves with ‘common sense’ values, and managing their risky behaviours in as cost-efficient a manner as possible.

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<sup>801</sup> C. MacKinnon, ‘Defining Rape Internationally: A Comment on *Akayesu*’ (2006) 44(3) *Columbia Journal of Transnational Law* 940, 955.

In this way, the submissive operation of consent evidenced in the historical periods examined in previous chapters does not seem so distant a past. Contemporary consent also appears as a means of submitting to an economic frame, wherein the ‘good’ that governs determinations of social utility is akin to the ‘good’ individuals might strive for in their own self-management regimes. Where corporeal commodification is a *rational* act, the effective management of this capital is what marks one as a member of the neoliberal community. To take risks that are not economically viable, to mismanage one’s bodily capital, is to take one out of balance or out of alignment with neoliberal ideals. To position consent as a choice serves to legitimize this calculation. It also serves to offload the responsibility for the various social conditions and relations which might impede agency or constrain choice to the individual and away from the state.

This is the new ‘art of government’ that Foucault examined in his own study of the emergence of neoliberalism, where the authoritative arm of the state was replaced with a production and management of freedom.<sup>802</sup> Subjects are free insofar as they exercise freedom in ways that are in alignment with the maintenance of the (neoliberal) order. As a proclaimed embodiment of this freedom, consent is not simply a means of governing, but of doing so under the guise of self-direction. It is, to employ the words of Foucault: ‘a limited use of an empty liberty.’<sup>803</sup> And while it is hardly a new line of thought to position political power and the dominant ideologies that support it as enabled more by the consent of the masses than the coercive force of the state,<sup>804</sup> consent itself is left

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<sup>802</sup> Foucault (n 655).

<sup>803</sup> Foucault, (n 88), 261.

<sup>804</sup> While this explanation is typical of classical liberal and social contract theorists, Marxists and Gramscian scholars have also noted the role of consent in establishing (perceptibly legitimate) state authority. Even Machiavelli’s *The Prince* advocates the avoidance of hatred from the masses, seemingly recognising that the power to govern lies ultimately in the will of the people. See, for instance, the work of Heather Ingham who offers some interesting insights on the figure of Chiron, the centaur, in *The Prince*, suggesting he represents the balance between a ruler’s use of force with that of law, the latter presumably grounded in popular consent: ‘Machiavelli and the Interpretation of the Chiron Myth in

unmarked in these analyses as is its promise of ‘autonomy.’ Legal scholars and reformers from all sides of the political spectrum debate how consent might be tweaked or re-tooled, while others argue it is no more than an ‘illusion.’<sup>805</sup> Yet the story of autonomy that is told about consent remains untouched. The vision is that if we can only ‘get it right,’ self-realisation, self-governance, and personal integrity will be ours. The previous chapters have attempted to demonstrate the long history consent has had as a form of submission to dominant norms of intelligibility. The question that remains is perhaps the most important: why, in present day, should it be necessary for us to understand consent as something else? Perhaps more to the point, what purpose is served by positioning this submission as autonomy? It is to this inquiry that the concluding chapter turns its focus.

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France’ (1982) 45 *Journal of the Warburg and the Courtauld Institutes* 217. I am indebted to my colleague, Andrew Moore, for this point on Machiavelli’s text.

<sup>805</sup> O’Neill, (n 86).

## CONCLUSION

Around my feet  
the strawberries were surging, huge  
and shining

When I bent  
to pick, my hands  
came away red and wet

In the dream I said  
I should have known  
anything planted here  
would come up blood.

– M. Atwood<sup>806</sup>

Consent might be thought of as planted in legal ground surging with bright and desirable aims. It is understood to be an enactment of personal autonomy, a guardian of bodily integrity, and an expression of free will. At first glance, this understanding of consent is difficult to interrogate – as Hart might propose, consent’s relation to these fundamental values is something we have put to memory.<sup>807</sup> Moreover, the values of personhood and freedom that are housed within consent’s story of autonomy are worthy ideals. They are not, however, enjoyed equally, as many feminist and critical legal commentators have shown, nor is the capacity for self-governance granted to everyone. And while the pre-requisites for consent and the processes through which it is obtained or assessed have been subject to able critique, consent’s underlying promise of autonomy is left intact. The aim of this thesis has thus been to open up a field of contestation within a narrative thought to be universally accepted as ‘common sense.’

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<sup>806</sup> ‘Dream 1: The Bush Garden’ in M. Atwood, *Journals of Susanna Moodie* (OUP 1970).

<sup>807</sup> Hart (n 10).

This narrative of consent-as-autonomy has gained such widespread acceptance in legal and political theory that it often ‘goes without saying.’ As some scholars maintain, ‘consent and autonomy are, it would seem, inseparable.’<sup>808</sup> Yet this inseparable association is countered by a rather pervasive claim in law about consent’s ‘ambiguous’ meaning or ‘shifting content.’<sup>809</sup> As Hilary Young has argued, ‘the law of consent is tailored to the circumstances in order to achieve certain goals.’<sup>810</sup> Certainly, the diversity of functions assigned to consent in law lends some credence to this claim. It is used to ‘morally transform’ wrong acts,<sup>811</sup> to establish the fairness of a trade or agreement,<sup>812</sup> to safeguard against liability claims,<sup>813</sup> and to establish the legitimacy of state action. With consent, a trespass is made a visit, a theft is made a gift, an assault is made a surgical intervention or welcomed touch, and an act of state force is made law. Amidst this wide range of operations and explicit commentary on consent’s ‘protean’ nature, consent’s common sense never changes. Why might this be? Has consent always been about autonomy?

The previous chapters’ investigations provide some evidence that, despite the ubiquity of the consent-as-autonomy story, it is a relatively recent conceptualization. Further, these historical examinations revealed alternative narratives of consent, its meaning, and the functions it was thought to perform that differed substantially from accounts of autonomy. This suggests that there is a wide universe of consent that is belied by the dominance and ahistoricity of the consent-as-autonomy story. This raises the question of why ‘autonomy’ has become not simply the most prevalent way of understanding

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<sup>808</sup> Cowan (n 19), 51.

<sup>809</sup> Westen (n 1).

<sup>810</sup> H. Young, ‘R. v. A.(J.) and the Risks of Advance Consent to Unconscious Sex’ (2010) 14(3) *Canadian Criminal Law Review* 273, 285.

<sup>811</sup> Hurd (n 6).

<sup>812</sup> R.E. Barnett, ‘A Consent Theory of Contract’ (1986) 86 *Columbia L.R.* 269.

<sup>813</sup> W.(A minor) (n 723).

consent, but the only one. Interrogating the effects of this obscuration represents the second overall aim of this thesis.

The difficulty of this task has been two-fold. In the first instance, the consent-as-autonomy story represents what Joan Scott has termed a ‘foundational discourse’ and, as such, positions certain presumptions or principles as unquestionable. Further, such discourses establish a ‘common ground’ of analysis based upon these fundamental assumptions that serve to ‘authorize and legitimize analyses; indeed analysis seems not to be able to proceed without them.’<sup>814</sup> In the case of the consent-as-autonomy story, these underlying values represent desirable ideals. Few principles have been as ‘compelling and seductive’ as personal autonomy, creating a second difficulty in ‘reading against the grain’ of the autonomy story.<sup>815</sup> Consent, viewed as a homeland for this idealized autonomy, holds an almost sacred place in law and political theory and its defense is all but automatic for most legal scholars. As such, my doctoral inquiry necessitated venturing to contexts where this autonomy narrative might not carry as much influence; where the social relations might differ so greatly from those in the present day as to destabilize the foundations of the consent-as-autonomy tale. As a means of framing this methodological route, I employed Foucault’s approach of genealogy, where consent could be positioned as an historical artefact, unhinged from some of the presumptions that enable and entrench its contemporary foundation in autonomy. This method, understood to be a ‘history of the present,’ aimed to uncover the conditions of possibility for modern understandings of consent.

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<sup>814</sup> J.W. Scott, ‘Experience’ in J. Butler and J.W.Scott (eds), *Feminists Theorize the Political* (Routledge 1992)

<sup>815</sup> Harvey (n 631).

This thesis began, however, in familiar territory, where the autonomy story was presented in Chapter One as a contemporary ‘canon’ of consent law. This included an examination of the legal requirements for establishing consent to sex, informed consent to medical treatment, and the defence of consent in sport, with a focus on the three ‘preconditions’ of consent that dominate the jurisprudence in Canada and the United Kingdom in criminal law and medical law. These key components of voluntariness, rationality, and knowledge were reviewed within the context of long-standing debates about legal paternalism and the limits to legitimate state interference in the decision-making capacity of ‘free’ individuals. This review revealed a paradox in the consent-as-autonomy story, where despite proclamations of universality, consent is a highly regulated sphere of freedom that is only available to certain kinds of subjects. While critical legal scholars, communitarian theorists, and feminists have criticised the way these requirements for consent have been applied by the courts, all of these accounts leave the meaning of consent (as autonomy) uncontested. The latter half of Chapter One maintained that this is attributable to the ‘common sense’ status which the autonomy story has gained in the modern period. The chapter concluded by tracing the connection between claims to a ‘common sense’ and the establishment of dominant norms of intelligibility, using a semiotic reading of Locke’s notion of ‘tacit consent’ to do so.

The project’s genealogical investigation began in Chapter Two, where the role of consent in the legal regulation of sex in Antiquity was examined. Focusing on three broad classifications of sexual offences in Classical Athens and Rome at the turn of the first century, Chapter Two demonstrated that in a historical context where personal and political autonomy was a right enjoyed only by free male citizens, consent functioned as

a marker and gatekeeper of community membership. Consent was a juridical right that could be exercised only by male citizens, serving to regulate access to the women in their households. In this way, consent marked out legally recognizable citizens while ensuring that access to female sexuality (and its procreative ends) would be restricted to other recognized citizens. This role of consent as a guardian of patrilineal interests also operated to constitute the boundaries of the public domain and those who were entitled to live within it, suggesting the ways in which consent serves as a delimiter of normative subjectivity. An examination of those who were excluded from the state on the basis of non-conformist subjectivities revealed that, despite an ability to live in a manner ‘free’ from state interference, these ancient ‘outlaws’ were not intelligible as ‘autonomous,’ nor were they capable of giving or refusing consent. Instead, their acts of independence lacked both coherence and cultural influence, often serving to further shame, rather than liberate, the non-conforming subject.

Chapter Three sought to uncover an alternative narrative for one of the most secured discourses of consent-as-autonomy in law: the informed consent doctrine. It began by demonstrating the prevalence of this narrative in bioethical and medical law scholarship, reviewing the many accounts of the informed consent doctrine which position it as a twentieth century invention. In an attempt to find a different story of how consent might have operated within the medical field, Chapter Two examined the doctor-patient relationship in the so-called ‘Dark Age’ of medicine: the Middle Ages. The discussion began by providing a picture of medieval medicine as a domain controlled by the Christian Church through a strict regulation of access to medical education and the content of what could be learned. Favouring theory over practice, this enterprise of monastic medicine worked to align many of the popular medical treatises of the ancient



period (such as the works of Galen and Hippocrates) with a Christian ethic. This was aided by the theological epistemology that was prevalent during the medieval period and which fostered an explanation for health and sickness that was rooted in divine intervention. If the ill sought healing, they would need to find it in God. This view necessarily influenced the medieval doctor-patient relationship and the codes of ethics that physicians themselves were held to account, often invoking images of the physician as an agent of God. This, coupled with other understandings of consent that were prevalent at the time in theological discussions of religious conversion, marriage formation, and trade and commerce, provided an understanding of consent within the medieval medical context as a form of submission (to God) which Chapter Three's conclusion argued was effected through a strict regime of self-management. The relationship between this medieval model of consent and contemporary regimes of patient self-care was explored at Chapter Three's end, suggesting ways in which this alternative story of consent may still operate today.

Chapter Four examined the treatment of the defence of consent as it used in cases that address assaults that occur during sporting activities. It began with a survey of the leading decisions from both Canada and the United Kingdom which establish what kinds of bodily harm (and for what purposes) a person can consent to. A more critical approach was then taken to these judicial interpretations of 'harm,' where it was suggested that the criminal law's reliance on a 'public interest' standard in these assessments of harm produces a normative framework for players where it is both rational and socially 'utile' to subject the body to violence and high-risk activity, provided it is in pursuit of social, cultural, and economic capital. The canvassing of these key 'sports violence' cases revealed how the defence of consent is not available

where the harm incurred is deemed to be lacking in sufficient ‘reason’ or social utility, where each of these limits is defined within a capitalist logic. This results in a judicial definition of ‘harm’ as non-conformity to hegemonic masculinity and a misuse of body capital, thus establishing consent as a kind of ‘license’ for corporeal commodification.

Chapter Five pursued a further investigation into the underlying neoliberal rationality that the sports violence cases had suggested was at work in judicial assessments of the defence of consent. It was also a chapter aimed at demonstrating how the alternative narratives of consent unearthed in the previous chapters’ historical investigations reveal a much wider universe of consent than what is represented by the consent-as-autonomy story. Moreover, Chapter Five maintained that these alternate understandings of consent as a marker of cultural belonging or a form of submission continue to operate today, albeit under the rubric of ‘autonomy.’ This can be seen as part of a neoliberal rationality that has served to define all aspects of contemporary social and political life within an economic calculus. On this basis, consent is available to those who conform to this dominant subjectivity, those who submit to the terms of intelligible neoliberal personhood. Chapter Five began with a brief description of these central components of neoliberal rationality, focusing on how these work to construct a normative way of being and acting in the world. Sexual assault and informed consent case law from Canada and the United Kingdom was then surveyed to examine how arguments of social utility and risk management are deployed in contemporary considerations of consent in ways that demand conformity to this neoliberal subjectivity. Further, the ahistorical status of capitalism was also examined as a way of explaining how these neoliberal definitions of the ‘self’ have been naturalized through the consent-as-autonomy story. The chapter concluded with a discussion of the role which this

autonomy narrative serves within capitalist ideology. Therein it was argued that the promise of embodied self-governance that is made by the consent-as-autonomy story enables both the history of consent as a form of submission and its modern day remnants to remain hidden from view. The contemporary subject enjoys a ‘freedom’ to consent, provided the acts and behaviours she chooses to engage in ultimately serve a neoliberal understanding of the ‘common good.’

The historical investigations that this thesis provided of consent in other periods suggest that it is a legal and political concept that has performed a wide array of functions that differ from its current understandings as a form of autonomy. Moreover, while it is common in contemporary scholarship to see consent positioned as a ‘twentieth century doctrine,’ this thesis has demonstrated that consent has a much longer history. What is recent about consent is its story of autonomy and, as Chapter Five revealed, this is a narrative embedded in a particular history and politics. This highlights a number of important observations about why the modern association between consent and autonomy is made so indivisible as to prevent its historicisation, rendering alternative understandings of consent unintelligible.

The first of these observations lies in one of the key objectives of the neoliberal state. Akin to the *laissez-faire* doctrine of classic liberal theory, neoliberal rationality presents itself as ahistorical and inevitable. It is merely the result of leaving citizens to make their own decisions. The consent-as-autonomy story enables a particularly disciplined form of corporeal commodification, as seen in Canadian and British case law that addresses bodily harm in criminal and medical contexts. This use of the body is understood through a lens of ‘choice,’ thus removing any contemplation of the state’s

interest or directive power in this economic constitution of subjectivity and its bodily deployment. The effect is to position neoliberal rationality as the ‘natural’ outcome of leaving citizens to self-govern, moving the conditions of possibility for a neoliberal order beyond the frame of inquiry and contestation.

Secondly, this corporeal commodification is ‘naturalized’ through this understanding of consent-as-autonomy. The result is the transfer of responsibility for the risks and harms that result from this economic calculus and its ‘use’ of human capital from the state to the private citizen. This serves to mask the inequalities and various circumstances that act to limit or direct individual choice in ways that marginalise certain subjectivities while privileging others. Wendy Brown describes this as moving the notion of self-responsibility to new heights, where ‘the rationally calculating individual bears full responsibility for the consequences of his or her action no matter how severe the constraints on this action – for example, lack of skills, education, and child care in a period of high unemployment and limited welfare benefits.’<sup>816</sup> The consent-as-autonomy story thus acts to enforce what Wacquant has described as a ‘laissez faire et laissez passer’ model for bodily harm and self-commodification which, while seemingly non-invasive for the ‘dominant class’ and its idealized subjectivities, ‘turns out to be paternalist and intrusive for the subaltern.’<sup>817</sup> This is a key component to the common ‘unfortunate but not unfair’ legal argument used to recognize inequality in opportunity or circumstance while denying state responsibility for these conditions of ‘poor fortune.’<sup>818</sup> Where one can be said to have ‘chosen’ an act (via consent), the

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<sup>816</sup> Brown (n 623), 42.

<sup>817</sup> Wacquant (n 622), 74.

<sup>818</sup> The comments made by the American bioethicist, Tristram Englehart, Jr. at the 1984 Shattuck Lecture are a good example: ‘Differences in need, both medical and financial, must be recognized as unfortunate... However, it must be understood that though unfortunate circumstances are always grounds for praiseworthy charity, they do not always provide grounds, by that fact, for redrawing the line between

consequences – however unfair or reproachable – are the individual's to bear. The social conditions which might have influenced this choice are not relevant factors in this equation.

Take, for instance, the arguments put forward by the Canadian government in the recent Supreme Court of Canada case assessing the constitutionality of the *Criminal Code*'s prostitution provisions.<sup>819</sup> In a judgment declaring the provisions to be invalid, the Supreme Court summarized one of the government's central claims as follows:

The Attorneys General of Canada and Ontario argue that prostitutes choose to engage in an inherently risky activity. They can avoid both the risk inherent in prostitution and any increased risk that the laws impose simply by choosing not to engage in this activity. They say that choice — and not the law — is the real cause of their injury.<sup>820</sup>

Although the Supreme Court dismisses these arguments, they are a poignant example of how the discourse of 'choice' can elide the socio-political and personal conditions that might constrain or unduly influence a decision to engage in sex work.<sup>821</sup> The 'consensual' participation of professional athletes in violence that is configured as 'part of the game' is another case in point, particularly given the circumstances which influence these players' participation (e.g. low levels of education or skill and lack of

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the circumstances we will count as unfortunate but not unfair and those we will count as unfortunate and unfair'; 'Allocating scarce medical resources and the availability of organ transplantation: some moral presuppositions' (1984) 311 *New England J. of Medicine* 66, 71.

<sup>819</sup> *Canada (A.G.) v. Bedford*, 2013 SCC 72.

<sup>820</sup> *Bedford* (n. 819), [79].

<sup>821</sup> This is made explicit in a subsequent paragraph in the judgment where the Court states: 'Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, [sex workers] often have little choice but to sell their bodies for money. Realistically, while they may retain some minimal power of choice — what the Attorney General of Canada called "constrained choice" (transcript, at p. 22) — these are not people who can be said to be truly "choosing" a risky line of business; (n 819), [86].

alternative and lucrative employment opportunities) and the cultural norms which construct this aggression and its risks as ‘reasonable.’<sup>822</sup>

Thirdly, the indivisible association of consent with autonomy allows it to benefit from the myth of liberalism’s non-interference principle. Chapters Four and Five demonstrated the ways in which consent operates in the contemporary context as a means of regulating the methods of and limits to corporeal commodification. It is positioned as a liberty or ‘right’ that is restricted to those who conform to dominant norms of idealized subjectivity. Provided one can align oneself with the model of the ‘good patient,’ the ‘good player,’ or the ‘good girl,’ the deployment of consent will be permitted. In this way, consent can be understood as a ‘license’ to certain uses of the body.<sup>823</sup> Licensing has been recognized by some scholars to be a means through which self-governing bodies are created, ‘allow[ing] governments to ensure that certain spaces, activities and people are under constant surveillance and are subject to immediate disciplinary measures’ without the appearance of state interference.<sup>824</sup> When consent operates as a license, it effectively renders the disciplinary measures of neoliberal rationality invisible, leaving ‘liberal sensibilities’ unoffended. This is the work of the autonomy narrative, its mythic promise of non-interference stated rather succinctly in the following excerpt from Don Herzog:

The liberal state doesn’t tell us how to lead our lives. It doesn’t insist that we be devoted to any one religion; indeed it is indifferent to whether we’re religious at all. It doesn’t instruct us on the merits of competing life plans, on whether it’s better to pursue fame, money, or a nondescript happiness. Provided we don’t

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<sup>822</sup> Two recent class action suits launched by former professional athletes against their sports leagues for the life-long injuries and long-term health damage their in-game violence has left them with has brought this issue to the fore in North American jurisprudence. This is particularly poignant given the recent deaths of professional athletes that have been linked to years of assaults incurred ‘on the ice’ or ‘on the field’; see Gordon (n. 451).

<sup>823</sup> See, for instance: M.J. Anderson, ‘From chastity requirement to sexuality license: Sexual consent and a new rape shield law’ (2002) 70(1) *George Washington L.R.* 51.

<sup>824</sup> M. Valverde, ‘Police science, British style: Pub licensing and knowledges of urban disorder’ (2003) 32(2) *Economy & Society* 234, 236.

harm others, the liberal state allows us to pursue our proudest aspirations – or to bask mindlessly in cathode rays emanating from our television sets. It is silent on a host of issues.<sup>825</sup>

The state does, however, appear to have quite a lot to say about how citizens should lead their lives, establishing normative ways of both being and acting in the world. Yet these prescriptions are neither visible nor subject to interrogation through the consent-as-autonomy story. Where one's consent to engage in a behaviour or to align with a normative subjectivity is defined as an act of autonomy, there is little room to examine the state's role (or its interests) in defining and policing these conformist ideals. Consent would thus seem to operate as a component of the 'ideology of freedom' Marx wrote about. The social experiences and interactions that take place within a capitalist society can be made sense of in a manner that does not implicate the underlying political rationality that enables these social relations to develop in the first instance.<sup>826</sup> Yet while it is tempting to view this ideology as merely an 'illusion,' the consent-as-autonomy story has proven to be more productive than this 'magical' descriptor might indicate, mandating conformity to subjectivities that privilege the neoliberal order under the rubric of 'freedom.'

Some legal scholars have already called for a displacement of consent in statutory treatments of sexual assault, where it is argued that an emphasis on the presence of coercion<sup>827</sup> or desire<sup>828</sup> might operate in more equitable ways. Bioethicists maintain that a redefinition of 'informed consent' as an on-going process, rather than a moment

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<sup>825</sup> Herzog (n 14), 148.

<sup>826</sup> M. Augoustinos, 'Social representations and ideology: Towards the study of ideological representations' in U. Flick (ed), *The Psychology of the Social* (CUP 1998).

<sup>827</sup> See: MacKinnon (n 801); and N. O'Byrne, 'Beyond Consent: Conceptualising Sexual Assault in International Criminal Law' (2011) 11(3) *International Crim. L.R.* 495.

<sup>828</sup> L.A. Remick, 'Read Her Lips: An Argument for a Verbal Consent Standard in Rape' (1993) 141(3) *Univ. Pennsylvania L.R.* 1103.

of decision or choice, is needed.<sup>829</sup> And many legal commentators have begun to suggest that sports violence is more aptly addressed in civil actions than through the defence of consent in criminal law. Yet what many of these reform strategies have in common is an uninterrogated commitment to the consent-as-autonomy story.

In this respect, this thesis has dug in familiar ground. The notion of freedom as not just an ideal but also an ideology has been amply explored within critical legal scholarship for decades. While understanding one's role in a social or political order in terms of submission was prevalent in pre-modern times, modernity is characterized by a ubiquitous belief in freedom. 'Never have so many people,' Alan Wolfe has written '... believed [they] should play a role in defining their own morality as they contemplate their proper relationship to God, to one another, and to themselves.'<sup>830</sup> Certainly, the historical investigations in Chapters Two and Three demonstrate how consent was conceptualised within a rubric of unequal power relations and compulsory subjectivities. The contemporary contexts explored in Chapters Four and Five demonstrate how consent continues to operate within a rubric of submission, albeit to a neoliberal order rather than a divine one. The central difference between these pre-modern and modern conceptions of consent is in the latter's commitment to freedom, to understanding everything – even submission – as an act of autonomy.

The way forward, then, may not be in redefinition or reinvention projects, but rather in what Alan Norrie has suggested is a call for the law to be more honest, even if that means having to be a bit 'meaner.'<sup>831</sup> I would argue the 'problem' with consent law is

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<sup>829</sup> See, for example, Rozovsky (n. 132).

<sup>830</sup> A. Wolfe, *Moral Freedom: The Search for Virtue in a World of Choice* (Norton 2002), 199.

<sup>831</sup> Norrie is referring to instances of mistaken self-defense and how a particular, 'less inclusive' view of citizenship underlies their judicial interpretation. His suggestion is that a more 'honest'



not in how it is defined, communicated, or limited, but rather its indivisible, unquestionable association with autonomy, itself a relic of a particular historical moment where the commodification of the body and the individualisation of responsibility was embedded into the ‘common sense.’ The modern condition as one entrenched in an ideology of freedom has rendered the conditions of possibility for the consent-as-autonomy story invisible and, along with those, any contemplation of the material context in which that ideology is enabled. Moving beyond the illusion of consent-as-autonomy may simply entail acknowledging the histories of consent that differ from this freedom fable, thus opening a space for contemplation between the ideal that consent has come to represent and the reality in which this concept is put to work today.

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acknowledgement of these political and moral components of the defense’s legal treatment might be ‘meaner’ (in that it would explicitly acknowledge the boundaries of socio-cultural membership) but less hypocritical. Determinations of consenting ‘capacity’ or ‘validity’ could arguably be put to the same task. A. Norrie, ‘The Problem of Mistaken Self-Defense: Citizenship, Chiasmus, and Legal Form’ (2010) 13 *New Crim. L.R.* 357, 376.

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